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REEN & SONS.

LBC
JCW
OJ
v. 6

II

REPORTS OF CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON

APPEAL FROM SCOTLAND,

FROM 1813 TO 1821.

VOL VI.

BY

THOMAS S. PATON,

ADVOCATE.

WITH

SUPPLEMENT AND GENERAL INDEX TO THE WHOLE SIX VOLUMES.

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APPELLATE JURISDICTION, &c.

In the Preface to the first volume of Appeal Cases, by Mr Robertson of London (from the Union down to 1726), there is given a historical sketch of the origin of the Appellate Jurisdiction of the House of Lords, in reference to Scottish appeals.

Prior to the institution of the Court of Session, it appears, that appeals were then competent to the King and his Council (Stair, B. IV., tit. 1, § 7); but the Act of Parliament 1425, c. 65, which established the first Court of Session, vested the Court with final jurisdiction, "to conclude, and *finally* determine, all and sundry "complaints, causes, and quarrels, that might be determined before "the King and his Council." This Act was subsequently confirmed and explained by the Act 1457; and no change was made in this respect, when the Court was established in 1532, as the College of Justice.

It may be questioned how far these Acts had ever been in strict observance, or whether they had fallen into desuetude, as affecting the right of appeal. On the one hand, it admits of no doubt, that anterior to the institution of the first Court of Session, in 1425, appeals were competent to the King and Parliament (Erskine, B. I., tit. 3, § 2), while, on the other, it is equally clear, that after *that* period appeals did not wholly cease. Although the Act 1425, instituting the first Court of Session, expressly conferred power on the Court *finally* to determine in civil causes, yet, it appears, that appeals were still resorted to *for more* than a century afterwards; for, in 1532, when the College of Justice was instituted, "appeals were "then," as Lord Stair states (B. IV., tit. 1, § 55–56), "in vigour and "observance." No doubt, he adds, that they did "absolutely fall "into desuetude, and cease, by the institution of the College of

" Justice;" but it does not appear that protestations for remeid of law, did also cease. In reference to these, he states, that " they are " *not*, in all cases, against law;" and, from section 52 to section 59, he enters into an inquiry how far it would be beneficial that *these should be extended.* Again, in reference to the period after the institution of the College of Justice, in 1532, it appears that appeals, as well as protests for remedy of law, were also in observance. The Act 1587, c. 39, refers to decisions pronounced by the Parliament of Scotland, in causes between party and party; and as this could only mean decisions in causes brought by way of appeal, it may be presumed, though few appeals are traceable at this period, that they were not uncommon. Erskine (B. I., tit. 3, § 20) gives instances where such appeals had been sustained; and Stair, though he does not admit this, states, that protests for remedy of law to Parliament were common in his time (Stair, B. IV., tit. 1, § 56 and 58). It, therefore, appears, that these acts were either not understood as wholly taking away the right of appeal, or that they had fallen into desuetude; or, at all events, since they were not respected or obeyed, that the power bestowed on the Session of *final* judgment, was an infraction of former rights, never wholly submitted to.

That the taking away the right of appeal was never entirely submitted to, is evidenced, by the dispute which occurred in 1674, between the Judges and the Bar of Scotland, mentioned in the Preface to Forbes' Decisions, where, in a suit between the Earl of Dunfermline and the Earl of Callender, and Lord Almond, the defenders, having been unsuccessful in their cause before the Court of Session, took an appeal to Parliament. This was then deemed by the Court as a step altogether illegal and unconstitutional. Accordingly, the Lords of Session complained to the King (Charles II.). The King interposed, and was resolute in supporting the Judges, and, by letters, authorised them to take trial of those who insisted on the right of appeal. Another appeal having been taken by Lord Almond and his lawyers, another complaint was made to the King, and the consequence was, that, having received further instructions from His Majesty, the Advocates, who persisted in the right of appeal, were banished twelve miles from Edinburgh, and fifty of them withdrew from the House.

Fortunately, when matters had attained this crisis, the dispute was compromised, by a proposal, on the part of the Advocates, accepted of by the Lords, in which the Advocates were made to " disown " and disclaim *all appeals* which *sist process* and *stop execution*, as

"being contrary to law." But, it was understood, that this did not take away the right to protest for remedy of law to Parliament, without the *stay* of *execution*, resulting as a natural incident and consequence of the appeal. Acordingly this right remained unrelinquished.

The right of appeal stood thus down to the Revolution. At the Revolution, a claim of right was made, to the effect that it was the right and privilege of the subject "to protest for remeid of law to "the King and Parliament, against sentences pronounced by the "Lords of Session, *provided the same do not stop execution of sen-* "*tences.*"

Accordingly, it appears, from the Revolution down to the Union, in 1707, that protests to Parliament for remeid of law, though without having the effect of staying execution, were common.—(Stair, B. IV., tit. 1, § 56, 59, *et seq.*) At the Union, the right to appeal to Parliament was much debated. On the one hand, it was contended, that such right was a part of the law and constitution of Scotland, and a right inherent in the subject. On the other, it was urged, that if such review were conceded, the law of Scotland, which was by the Union to remain entire, might be materially infringed and innovated. It was at last proposed, apparently on the concession, that the right of appeal was incontrovertible, that this Court of Appeal should be in Scotland, and that it should be composed of Peers delegated by the House of Lords assembled in Parliament, to be named annually or triennially; but this scheme, after considerable debate, was not agreed to.* De Foe's History of the Union, p. 158, *et seq.*

In these circumstances, the right of appeal was left on the same footing as that from the other parts of the empire, by force of the Act of Union itself; which, though containing nothing express in regard to the right of appeal, implies a communication of the "same "rights and privileges which pertain and belong to the subjects of "either kingdom." And all that the Articles of Union declares is, to confer "on the Court of Session, and the Court of Justiciary, the "same privileges as before the Union," and to make it incompetent "for the Courts of Chancery, Queen's Bench, Common Pleas, or "any other Court in Westminster Hall," to review or alter the sentences of the Courts in Scotland. The Courts here named are inferior to the sovereign tribunal of the House of Lords; and this clause of the Union has never been construed, and was not intended

* A similar proposal was revived 1806, but ended in nothing.

to apply to appeals from the Courts in Scotland to the House of Lords.

In regard to criminal cases, it does not appear that, before the Union, any appeal was competent from the Court of Justiciary to Parliament. At the Revolution, the Bill of Rights, which insisted for the right of appeal in civil causes, made no such claim of appeal in criminal cases. Not one of the institutional writers has laid it down, that such appeal was competent. There appears to have been no instance of such appeal before the Union, and no instance after it, until 1766, when the case of Ogilvy occurred, and another case in 1768, and Bywater's case, in 1781, in all which cases the appeal was held to be incompetent.

It was thought that these cases had sufficiently settled the law on this subject, until 1793, when the question was again revived in the case of Robertson and Berry, tried for sedition. The jury had given a verdict, finding the printing and publishing proved, without saying anything of the felonious intent. Objections having been taken to this verdict, they were repelled; and on appeal to the House of Lords, the appeal was held to be incompetent. About the same time, the point was again stirred in the noted cases of Muir, Palmer, Margarot, and others, but without effect, the law, as laid down by Lord Mansfield in Bywater's case, being considered as having settled that such appeals were incompetent.

An exception, however, to this rule takes place, where the Court of Session judges in crimes committed in suits conducted before it, such as in forgery, perjury, &c. The sentence, in such cases, is subject to appeal to the House of Lords, as was decided by Lord Thurlow, in the case of Carse.

In civil causes, the first appeal, after the Union, was brought in the session 1707–8 by the Earl of Roseberry; but, after answers were ordered, it was compromised.

In an appeal, two years after the Union, a standing order of the House of Lords was made in regard to appeals from Scotland, to the effect, that, after an appeal was lodged, and order made to answer the appeal, and notice of such order duly served on the respondent, *the sentence* appealed from was *not* to be *carried into execution.*

Ever since that time, appeals to the House of Lords, from the Supreme Courts of Scotland, have continued, and are now a part of the constitutional law of the country—the appeal being to the Lords in Parliament, and the judgment, when pronounced, being the judgment of the Lords Spiritual and Temporal in Parliament assembled.

In theory, this is so in its very nature and essence, not as a mere fiction, but as involving a great principle. In practice, it is either the Lord Chancellor singly, or the Lord Chancellor and other law Lords in conjunction, who constitute the tribunal of appeal, the lay Lords being present and voting, if they please, but generally abstaining from either.

Appeals had gradually increased in number in 1777 and in 1807. At the latter period, they amounted to 200. This increase gave rise to some discussion in the House of Lords, which ended in an inquiry, made to the Judges in Scotland. From this inquiry, it appeared that many appeals were entered for the mere purpose of delay, or to stay execution; and the Judges recommended, as a remedy, that the right of appeal should be restored, as it stood before the Union—namely, that the appeal should *not have the effect of staying execution.* This led to the Act 48 Geo. III., c. 151, § 17, which regulated the matter both of interim possession and of execution, and gave to the Court of Session a discretionary power in such matters. This Act does not appear to have been attended with the results anticipated from it; for, about four or five years later, the number of appeals had increased to 272.

So freely, however, is this Appellate Jurisdiction open and accessible to the subject, that an appeal is competent for the smallest sums, and for the most trifling matter of right; but the tendency of recent legislation has been materially to check appeals of this nature, and also to diminish the number of appeals.

These Reports, which were commenced by Mr Robertson of London, and continued by Messrs Craigie and Stewart, complete the series from the Union down to 1821. In as far as the compiler is concerned, had circumstances permitted, they might, with fuller materials at command, have been more perfect, and some of the rubrics less defective; but, he is confident that the *matter* of these Reports otherwise, will stand the test of the most searching scrutiny for accuracy, in giving a faithful transcript, from the appeal cases, of the facts of each case, and of the argument in fact and law pleaded by the parties. He has adhered strictly to the appeal papers; only giving the matter in a more abridged form, omitting (he hopes) nothing material, and dispensing only with unnecessary detail.

The speeches of the Lord Chancellors, in delivering judgment, have been collated from the most authentic sources. He had access to the papers of Lord Chancellor Hardwicke. Lord Mansfield's speeches were collated, some from law magazines, or kindred publi-

cations of the period, and some found printed in subsequent cases, for the information of the Court, among the session papers in the Advocates' Library. But in reference to the speeches of Lord Chancellors Thurlow, Loughborough, Eldon, &c., he is greatly indebted to gentlemen of much experience and integrity in their profession, Messrs Spottiswoode and Robertson, and Mr John Richardson of London (chiefly to the former), who, for half a century, had been engaged as solicitors on either side, in almost every appeal case, and who, in the most liberal manner, gave the compiler the collection of speeches in their possesion. In the first four volumes, it did not occur to the compiler to give the names of the parties who took the notes of the Lord Chancellors' speeches. Afterwards, however, this was suggested to him. Four instances occur where this has been omitted, in reference to speeches taken by Mr Gurney, the short-hand writer. All the others, that are not specially marked by whom taken, were taken by Messrs Spottiswoode and Robertson, *i. e.*, by either of these two gentlemen. A list, distinguishing by which of them they were so taken, was sent along with the volumes, but had gone amissing. None of these speeches have therefore come from any unreliable source, but directly from the London solicitors actually engaged in the appeals, and present at the giving of judgment. The judgments of the House of Lords have been transcribed from the journals of the House; and the opinions of the Judges of the Court of Session have been taken from the manuscript notes of the Judges, written down by them on their session papers at the time, and which are now preserved in the Advocates' Library.

In collating the cases, the compiler endeavoured to discover the influence and bearing each case had in forming the law of Scotland, by tracing it to its authoritative results. By this method of investigation, he was enabled, by comparison, to correct many errors in himself, and, at same time, to come upon the omissions and errors of others, which he thought it a legitimate part of his duty, in some cases, to call attention to. If, in pointing out these, it has been thought he has shewn disrespect to great names, or has given offence in any quarter, all he can say is, that he most sincerely regrets it, as nothing was further from his intention.

To those gentlemen of the Bar who have countenanced these Reports from the commencement, this grateful acknowledgment is due, that, had it not been for their support, they would never have attained to the present completion.

And, finally, the compiler has to acknowledge many valuable

suggestions received, in the course of their preparation, from Professor More and Mr Patrick Fraser, advocates, who never fail to take an interest in every thing which belongs to the jurisprudence of their country.

A general index of names for the whole six volumes will be found at the end of this volume, which ought, in all cases, to be consulted, if the case sought for is not found under its appropriate date; and superadded to that will be found the list of the omitted cases promised by Messrs Craigie and Stewart.

Of the 101 Scottish appeals reported by Messrs Dow and Bligh, about one-half are reported here.

1814.

GRIER, &C. v. MITCHELL.

rested a large quantity of salt, to wit, seventy bushels of salt which had been removed from a certain salt-work in the district of Annandale, without a true and lawful permit.

The plea put in to this information by the defendants in defence was, That the salt, parcel, and so forth, was not, within the time aforesaid, removed from the salt-work without a true and lawful permit, *contrary to the statute.*

A special jury having been empannelled and sworn on the 24th of January 1809, they returned the following verdict:—

" The jurors say, upon their oaths, That the plaintiff was " an officer of excise during the period charged in the infor- " mation, and that within the said period he seized, to the " use of His said Majesty and himself, as forfeited, the salt " mentioned in the information: That the said salt, at the " time of the seizure thereof, was found removing from a " certain salt-work in Scotland, and within the bounds of the " district of Annandale, without being accompanied with any " permit: That the salt was manufactured, or made, at " Priestside and Cockpool, in the parish of Ruthwell, in the " district of Annandale, by the defendants, by a method long " practised in that country; to wit, by gathering large quan- " tities of sea-sand, incrusted and impregnated with salt, into " pits or holes, and extracting from the said sand, by pouring " water thereon, a liquor or brine, which, being afterwards " boiled in vessels or pans made for that purpose, salt is ob- " tained from the same of a quality considerably coarser than " what is commonly made at the salt works in Scotland; and " that when sold it sells for the price of about five shillings a " bushel weighing fifty-six pounds: That the said parcel of " salt, in the said information mentioned, being made in the " manner above-mentioned, was never charged with or paid " any duty to His Majesty: That in no part of Scotland is " salt made or manufactured by the same process with that " used in manufacturing the salt under seizure: That the " said salt under seizure is of such inferior quality, as salt " usually made in that manner and of such value, to wit, of " the value of five shillings or thereabouts, the bushel: That " when seized it was removing, without permit as aforesaid, " from the parish of Ruthwell, in the bounds of Annandale, " where it was made, to a certain other place within the " bounds of Annandale, in order to be there sold and disposed " of: That upon the 12th day of July 1661, an act was " passed in the Parliament of Scotland, of the tenor follow- " ing: 'At Edinburgh, the 12th day of July 1661 years, the

"Estates of Parliament having heard a supplication pre-
"sented unto them by Adam Newall, in behalf of some poor
"people and tenants in Annandale, who, by their industry or
"toilsome labour, do from sand draw salt, for the use of some
"private families in that bounds, and who, in regard of the
"painfulness and singularity of the work, have ever been free
"of any public imposition or exaction, until the year 1656
"or thereby; that the late Usurper, contrair to all reason,
"equity, or former practice, forced from them an exaction, to
"their overthrow and ruin, and thereby so depauperated them
"that they are in a starving condition, and humbly desiring
"that they may be freed from that unwarrantable exaction; as
"also having heard and considered the Report from the Com-
"missioners for Trade and Bills, with their opinion thereanent,
"the King's Majesty, with advice and consent of the Estates
"of Parliament, declares the said salters winning and making
"salt within the bounds above specified, in manner above-
"mentioned, to be free of any payment of excise therefor,
"and discharges all collectors or others, from any uplifting or
"exacting of the same in time coming. Extracted furth of
"the Records of Parliament, by me, Sir Archibald Primrose
"of Chester, Knight and Baronet, clerk of His Majesty's
"Council, Register, and Rolls. Sic subscribitur, A. Prim-
"rose.' That from the time of passing of this Act, till about
"the year 1781, the quantity of salt so made was never of
"any considerable amount, but that, since that time, in
"favourable seasons, salt had been there made to the amount
"of from fifty to sixty tons annually; and if, upon the whole
"matter aforesaid, the Court shall be of opinion that the
"defendants are not legally entitled to make or manufacture
"salt in the manner above-mentioned, without payment of duty,
"then the jury find for the plaintiff; but if the Court shall
"be of opinion that the defendants are legally entitled to make
"or manufacture salt in the manner above described, without
"payment of duty, then the jury find for the defendants."

This verdict having been taken into consideration by the Court on the 31st January 1809, and after the Barons had delivered their opinions at large (in which they were not unanimous), judgment was given for the plaintiff (defendant in error.) Whereupon a bill of exceptions was tendered, but refused. Jan. 31, 1809.

Against this judgment the plaintiffs in error brought their Writ of Error returnable in Parliament, and humbly hoped that the judgment would be reversed.

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GRIER, &c. v. MITCHELL.

Pleaded for the Plaintiffs in Error.—1. The particular ground upon which this information was founded was, that the salt in question was removed without a permit, as required by 38 Geo. III., c. 89, § 35; but by the special verdict in this case, the whole matter was put upon this ground, Is the salt in question liable to the payment of the duties specified in the Act or not? And it was held, that the regulations as to permits did not attach to the same, unless it was liable in payment of duty. 2. But the Act of Parliament of Scotland in 1661 (recited at length in the special verdict), gives a clear and explicit right to make salt within the bounds of Annandale, of a certain kind, free from "any payments of "excise therefor, and discharges all collectors or others from "any uplifting or exacting of the same in time coming." Before the passing of this Act, the salt coats and sand floors of Ruthwell, where this manufacture was carried on, were ancient feudal rights of property granted by the Crown to the Earls of Annandale: these were afterwards transferred to the family of Stormount, and have been continued regularly in their rights and investitures from the Crown ever since. 3. Besides, the 6th article of the Union preserves all private rights and privileges, and it was distinctly shown in evidence, that the salt in question is of the kind which the statute meant to exempt from duty, and that it was made within the bounds pointed out by the Act; and the practice has been publicly carried on from the time of the Union for a period of one hundred years, without challenge.

Pleaded for the Defendant in Error.—1. That the exemption given by the Scotch Act ceased with the annihilation of all duties upon salt in 1671, and did not exist, therefore, at the period of the Union in 1707. 2. That if it could be contended that it only lay dormant, while no duties were collected on salt, and therefore had not ceased before the Union, it was at any rate completely put an end to by the Union, as the Act of the Scotch Parliament regarded only the Scotch Excise. 3. That both duties and exemption ended with the Union, and no exemption can be claimed against subsequent duties which is not recognized by the Articles of Union, or by some clause in an act subsequent to the Union.

After hearing counsel,

It was ordered and adjudged that the judgment given in the said Court of Exchequer in Scotland be, and the same is hereby reversed. And it is further ordered and adjudged, that the said Court of Exchequer in Scotland,

do award a *venire facias de novo*, and proceed according to law, and that the record be remitted to the said Court of Exchequer in Scotland. The tenor of which judgment to be affixed to the transcript of the record, is as follows:—"But because the Court of our said Lord the King in his Parliament aforesaid, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties here until Wednesday the 27th day of April 1814, wheresoever, etc., to hear their judgment thereon, for that the Court of our said Lord the King, in his Parliament aforesaid, is not yet advised thereof, etc. At which day, before the same Court of Parliament aforesaid, at Westminster, came the parties aforesaid, by their attorneys aforesaid; whereupon the Court of Parliament having seen and fully understood all and singular the premises, and having diligently examined and inspected the said record and process aforesaid, and the judgment thereupon, as the several matters recited and contained in the said bill of exceptions, and the causes and matters above assigned of error, by the said John Grier, George Johnston, and John Porteous, it appears unto the said Court that the said judgment of the Barons of the said Court of Exchequer in Scotland is erroneous, and that in giving the aforesaid judgment there is manifest error, Therefore it is considered by the same Court of Parliament aforesaid, that the judgment so given, as aforesaid, be reversed, annulled, and altogether held for nought; and that the said John Grier, George Johnston, and John Porteous, be restored to all things which they have lost by occasion of the judgment aforesaid. And thereupon the said record, and also the process, had, in the said Court of Parliament on the said premises by the said Court of Parliament, are sent back to the Court of our said Lord the King, before the Barons of the said Court of Exchequer in Scotland, to issue a new writ of *venire facias* to try the issue found between the parties, and to proceed thereupon, and do therein, what to law and justice shall appertain."

For Plaintiffs in Error, *Sir Samuel Romilly, Mat. Ross, J. A. Murray.*

For Defendant in Error, *V. Gibbs, Archd. Colquhoun, Wm. Harrison.*

NOTE.—Unreported in the Court of Session.

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HEPBURN v. CALLANDER, &c.

JAMES HEPBURN, Esq., of Humbie, - *Appellant.*

Sir JOHN CALLANDER, Bart., and JAMES JUSTICE, Esq., of Justice-Hall, - - - *Respondents.*

House of Lords, 28th April 1814.

TEINDS — WARRANDICE AGAINST FUTURE AUGMENTATIONS — RELIEF.—The question was whether the appellant (as representing Adam Hepburn of Humbie) was liable in warrandice of the tithes of the parish of Crichton, to the respondents or their successors, against the future augmentations of stipend to the minister of the parish. The Court of Session held him bound in such warrandice, and therefore found him liable to relieve the respondents from such augmentations. The original title of the appellant was long leases of the tithes; and in the House of Lords, the judgment of the Court of Session was reversed; and held, 1st, that the obligation of warrandice could only extend to the endurance of the leases and prorogations of these leases, and to augmentations obtained while these leases were unexpired; and 2d, that the real right of titularity was not then vested in the Hepburns to entitle them to convey any larger right.

Certain leases of considerable endurance (six, nineteen years) were granted of the parsonage and vicarage tithes of the Collegiate Church of Crichton, which were conveyed by deed of translation and disposition to Sir Adam Hepburn, who had already acquired right to the lands and barony of Crichton, together with the patronage of the parish, holding these and the leases of the tithes by separate titles.

June 3, 1682. In 1682, and while these rights were so held separately, Adam Hepburn of Humbie (son of Sir Adam) and his brother, David Hepburn, sold the barony of Crichton to Sir William Primrose, "with the advocation, donation, and right of patron-"age of Crichton." And in the same deed there was contained special assignation of "the two tacks above-mentioned, "and decree of prorogation thereof, and the assignation "thereof," etc., with this warrandice of the same—namely: "Warrand the foresaid right, assignation, and translation of "teinds, parsonage and vicarage above mentioned, to the said "Sir William Primrose and his foresaids, during the haill "space and years contained in the said tacks and prorogation "thereof, yet to run, at all hands, and against all deadly, and "likewise from all future augmentations of the minister's "stipend beyond the sum of , presently payable to the mi-"nister," etc.

Sir James Justice afterwards acquired the barony of Crich-

ton from Sir William Primrose in July 1738, and Sir James Justice conveyed the same to Mr Livingstone, with consent of his son, Mr James Justice, in trust for payment of his debts. The lands were accordingly sold to Mr Pringle, who bought the same, with "the teinds of the said whole lands, barony, "and others above written, both great and small, parsonage and "vicarage," to which these parties had now an absolute right independent of the leases; and Mr James Justice gave absolute warrandice in these terms,—binding and obliging "himself, his heirs and successors whatsoever, not only to warrant, "acquit, and defend the saids Mark Pringle and his foresaids "from all minister's stipend, future augmentations, and other "burdens, of whatsoever nature, imposed, or that shall be "imposed, on the said teinds, parsonage, and vicarage, of the "said lands and barony of Crichton, excepting the stipend "presently payable out of the foresaid teinds to the minister of "the parish of Crichton; and also, in case of erection of the "foresaid teinds beyond the stipend presently payable, to "content and pay to the said Mark Pringle and his foresaid "such sums as shall be equal and amount to twenty-four "years' purchase, of any such erection."

The barony of Crichton was sold by Mr Pringle to Colonel Ross some time afterwards, and was by him and his commissioners conveyed, in 1786, to Alexander Callander, who was succeeded by his brother Sir John, the respondent. 1786.

It appeared that the minister had, in 1777, raised a process of augmentation of his stipend, calling Colonel Ross and the other heritors, and obtained decree therein in 1781. The appellant was not called in that process, and he never heard of it until after the decree was extracted. 1777. 1781.

The present action of relief and freedom from such augmentation of stipend was then brought by the respondent's father, Mr Callander. At the time this augmentation was obtained, the leases were expired, and the appellant, in his defence, contended—1*st*, That the leases of the tithes, in which he alone had concern, and in which his predecessors had given warrandice, could only apply to the period of the endurance of the leases, and no longer; and when these expired, the warrandice contained in them expired also. 2*d*, That he had no concern with the warrandice granted in 1739 by Mr James Justice, in whose right Sir John Callander now was. That warrandice was a different warrandice altogether—an absolute warrandice applicable to a perpetual heritable right. 1781.

After various interlocutors of the Lord Ordinary and the

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Court, it was ultimately found, that the sum "for which the "respondent was entitled to relief (from 1784 to 1806) "amounts to £1876, 6s. 10$\frac{6}{12}$d., and that the augmented sti- "pend of the temple-lands for the same period, amounts to "£76, 5s. 4d., finds the defenders, James Justice and James "Hepburn, conjunctly and severally liable for the above two "sums, amounting to £1952, 12s. 2$\frac{6}{12}$d., as due at Lam- "mas last, with interest thereof from the above last term, and "decerns therefor accordingly, but finds the said James "Justice, in terms of the interlocutor of 15th June 1805, "and subsequent interlocutors, is entitled to relief from the "said James Hepburn for the above sums, in so far as the "same shall be paid by him; Finds, that the augmented "stipend of the lands of Longhaugh, Crichton Dean, and "Kerr's Green for the above period, and due at Lammas last, "amounts to £95, 10s. 1d.; Finds the pursuer entitled to "relief of the above sum, from James Hepburn, with in- "terest, &c., and decerns with expenses;" the Court holding that the appellant's obligation of relief was not limited by the endurance of the leases, but was absolute and unqualified in its nature. On reclaiming petition, the Court adhered.

Nov. 22, 1808.

Against these interlocutors the present appeal was brought, in so far as they find that the appellant, as representing Adam Hepburn of Humbie, is liable in warrandice of the tithes of the parish of Crichton, either to Sir John Callander or to Mr James Justice, or their successors, against the augmentation obtained in the process raised by the minister of the parish in 1777, or against any other or future augmentation.

Pleaded for the Appellant.—1. Whatever obligation may lie on the appellant as representing his ancestor, Adam Hepburn, it is totally distinct from, and has no connection with, the obligation of the respondent, James Justice, as the representative of Sir James Justice, to the other respondent, Sir John Callander.

Throughout the argument in the Court below, the respondent, Mr Justice, took great pains to impress the Court with the idea that the case between him and the appellant was exactly the same as the case between Sir John Callander and Mr Justice himself; and it was always represented as a matter of hardship, that the respondent should be found liable in warrandice to Sir John Callender, unless the appellant was found liable in relief to him. But this is a very incorrect and unjust view of the case. The claim of warrandice against the appellant, whether made by Sir John Callander or by Mr

Justice, has no more connection with the claim of warrandice made by Sir John Callander upon Mr Justice, than if they related to totally different estates, or to the tithes of a totally different parish. Sir William Primrose got an unquestionable right to the patronage of the parish, which at that time was an effectual right in its own owner, but gave no right to the teinds. The Acts 1690 and 1693 took away the proper right of patronage, but, as a recompense, gave in place of it the tithes not previously disponed. Sir James Justice acquired full right from the family of Primrose; and he had an unquestionable title as titular of the teinds of this parish. Having thus a perfect right, he conveyed to the author of Sir John Callander, not *leases*, or any temporary rights, but the real and unquestionable property of the teinds themselves, for ever. The title, as an heritable right, being as undoubted as any title known in Scotland, he would have no difficulty in warranting it as good against all the world. But as the statutes which constituted it, did expressly subject the teinds thus to be held heritably by the patron to the burden of a competent stipend to the minister of the parish, the purchaser, Mr Pringle, had insisted that Sir James Justice should undertake, for ever, to warrant the perfect right thus conveyed against a burden to which it was by its nature subject. If this was to be undertaken at all, the obligation was, from the very nature of the thing, perpetual; because the right which was warranted against it was unlimited, and in all other respects perfect. Accordingly, the terms of the conveyance and of the warrandice are absolute. Sir James Justice dispones *the tithes themselves*, as being his undoubted property, and without reference to any limited title; and then the warrandice is not qualified as relative to any particular title, but it is simple and general, in respect of the price paid, to "warrant, acquit, "and defend the said Mark Pringle from all minister's stipend, "future augmentations, or other burdens, of whatever nature, "imposed, or that shall be imposed, on the said *teinds, parsonage* "*and vicarage*, excepting," &c. This is the obligation to which the respondent, Mr Justice, is liable; and there cannot be the least doubt that it is effectual to Sir John Callander. Accordingly, Mr Justice has admitted this, and has entered no appeal against the judgments of the Court of Session, finding him liable in relief upon the warrandice. But it is not the obligation of the appellant. The appellant's ancestor had ceased to have any connection either with the lands or with the teinds nearly *sixty* years before that obligation was granted.

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The obligation of warrandice which he had truly granted, was different in every essential particular. He neither had given, nor pretended to give, any perpetual or real right to the teinds. He warranted no such right, either against eviction or against augmentations; and in the warrandice which he did give, he confined it specially to the limited right conveyed, and to the years during which that limited right was, by its nature, to subsist. 2. But, in the second place, the real right of titularity of the tithes of Crichton was never vested in Adam Hepburn, the granter of the disposition in 1682; and no right was conveyed by him, or obligation granted, except with references to the leases.

Pleaded for Sir John Callander.—1. At the date of the conveyance in the year 1682, by the appellant's predecessor, Sir Adam Hepburn of Humbie to Sir William Primrose, the right and interest of the former in the teinds of the barony of Crichton, even, independently of the existing leases of those teinds, was of a kind so effectual and substantial, as to be the fair subject of purchase by the latter, and of consequence to be the fair subject of legal warrandice. As the patron of the church of Crichton, Sir Adam Hepburn had in his power, the legal means of securing to himself and his successors, the actual possession of teinds, subject to the existing burdens, by taking from the successive beneficiaries in the church, a renewal or prorogation of those leases. The acknowledged lawfulness of such transactions had given to the patrons of churches, even prior to the Act of Parliament 1690, "concerning patronages" a right over the free teinds of their respective parishes and churches, which was practically equivalent in value to a direct right of property. 2. By the above conveyance, Sir Adam Hepburn did, in fact, transfer to the purchaser of the lands of Crichton, all that right and influence which, as patron of the parish, he possessed over the teinds. It contains a direct conveyance of the right of patronage of the provostry of Crichton, together with a right to all the existing leases, with the teind sheaves, and vicarage teinds, themselves mentioned in the said leases, "together with all "kindness and possession of the said teinds perpetually in all "time coming." In consideration of this effectual conveyance of the lands "*in all time coming*," Sir William Primrose paid a price equal in right to that which he actually paid for the property of the lands themselves; manifesting in this manner, the clear knowledge and understanding of the parties as to the substantial and permanent nature of the right, which

was the subject of the purchase. Besides, "in regard that the "said Sir William Primrose paid as much for the said teinds, "as for the stock of the lands," out of which they are payable, Sir Adam Hepburn became bound to warrant the foresaid right, not only during the currency of the existing leases, but likewise "from all future augmentations of minister's stipend, "beyond the sum then payable."

Pleaded for James Justice.—1. The right to the teinds purchased by the respondent's author, Sir William Primrose, though indirect in its form, was in its nature and legal effects, absolute and perpetual. 2. The same price was paid for land and teind, and upon the narrative of that circumstance, the same absolute warrandice was given as to both. 3. Besides, the teinds, at that conveyance, were expressly warranted against all future augmentation, which of itself is decisive of the question.

After hearing counsel,

THE LORD CHANCELLOR said,

"My Lords,*

"The question in this case is, whether in a deed executed by Adam and David Hepburn, a warranty against all future augmentation of minister's stipends, was a warranty against augmentations in all time to come, or only during the currency of certain tacks of the teinds of the Collegiate Church of Crichton.

"The Lord Ordinary was of the latter opinion. His Lordship pronounced the following interlocutor:—(Here his Lordship read the interlocutor of the 15th June 1805), which stated the import of the deed, 1682, most correctly.

"In considering this question, whether the granters of this deed meant to warrant the teinds from all augmentations of stipend, not only during the time for which the teinds were assigned, but in all time coming, your Lordships heard a very able argument from a gentleman, who, then, I believe, appeared for the second time at your Lordship's bar with great credit to himself (Mr J. A. Murray),† upon the point—In whom were the tithes vested in 1682? But, I think it may be distinctly stated, that the direct right to the teinds was not in the warranters, so as to enable them to convey the inheritance of them.

"In the respondents' cases, it is stated that by management a patron might get a right to the tithes free from the burden of future augmentation; and this may be very true, but in one part of this deed, 1682, the lands and patronage are conveyed, and there is a warrandice of "against all deadlie," and there the interest

* Taken by Mr Spottiswoode.

† Now Lord Murray.

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which the granters had in the teinds is assigned in another part of the deed, in which they are stated to have been originally demised by a provost; and that afterwards, on account of an augmentation of stipend to the minister, a longer lease of these tithes was granted. The teinds are assigned in these words, 'assigns, transfers, and 'dispones to the said Sir William Primrose and his foresaids, the 'two tacks above mentioned, and decreet of prorogation thereof 'above expressed, with the assignation thereof above mentioned, 'made to the said Sir Gideon Murray, and ratification and new 'assignation of the same, granted to the said Patrick Lord Eli-'bank, his son, with the translation and disposition above re-'hearsed, granted to the said umquhal Sir Adam Hepburn and 'Thomas Hepburn, his son, with all Acts of Parliament, decreets, 'and other rights and securities of and concerning the said par-'sonage and vicarage teinds, together with the said teind 'sheaves, and the vicarage, rogation, and that in so far as the 'said tacks and rights may be extended to the parsonage and 'vicarage teinds of the lands, barony and others above disponed, 'for this present crop, and year of God 1682, and hail remnant 'crops and years of the said tacks and prorogation yet to run, 'together with our kindness and possession of the said teinds per-'petually in all time coming, and all action, instance and execu-'tion competent, or that may be competent to us by virtue of the 'said rights, for now and for ever.'

"I call your Lordships' attention to the terms of the warrandice, before considering the motives of it; it is in these words:—'And 'in regard that the said Sir William Primrose has payed as much 'for the said teynds, as for the stock of the lands out of which 'they are payable, therefore wit ye us the said Adam Hepburn of 'Humbie, and David Hepburn of Randerston, to be bound and 'obliged lyk as we by thir presents, bind and oblige us and our 'foresaids conjunctly and severally as said is, for ourselves, as 'taking burden on us for our said spouses, with consent foresaid 'to warrand the foresaids right, assignation, and translation of 'the teynds, parsonage and vicarage above mentioned, to the said 'Sir William Primrose and his foresaids, during the hail space 'and years contained in the said tacks and prorogations thereof 'yet to run at all hands and against all deadlie *and likewise from* '*all future augmentations of the minister's stipend*, beyond the sum of ' presently payable to the minister, and 'payable to the schoolmaster, and likewise to warrant the foresaid 'right and disposition to the said annuities aforesaid at all hands 'and against all deadlie.'

"In Scotch deeds the mode is rather to warrant the grant than the thing itself; but the grant is warranted according to its terms. Then follow the words—'and likewise from all future augmenta-'tions of minister's stipend.'

" Warranty is *stricti juris*, but this rule must give way to *express terms*, declaring that the warranty was to go beyond the terms assigned; such an extension of the warranty is not probable, and on looking at the words of it, it is clear that the warranty is only during the terms of the tacks. The obligation is to warrant the tacks, &c., during their terms, and to warrant from farther augmentations during those terms. No, say the respondents, *that* is done already in the deed, and this must mean something more. They are right in this; for the first warranty would not have secured against future augmentations—this warranty had no connection with the *title* to the subjects, but to something more. But the respondents say farther, that the purchaser paid as much for the teind as for the stock of the lands, which is a reason why the warranty should be perpetual. The answer to this is, that there was a term of 80 years of the leases to run, which was sufficient to account for the price.

" If the operative part of the instrument goes no farther than to warrant during the terms of the leases, we must abide by it. There is, indeed, no reason for carrying the warranty further. If any right to the teinds could only be acquired by management on the part of the patron, the granters of the deed, by giving the inheritance of the patronage, put the purchasers into the same situation as themselves, and there could be no motive for any ulterior warranty.

" It appears to me that it will be necessary, in our judgment, to find that the warranty continued only during the terms of the tacks, according to the finding of the Lord Ordinary (15th June 1805), to reverse all that is not consonant to this, and to remit to the Court of Session to proceed accordingly."

LORD REDESDALE said,

" My Lords,

" I perfectly concur with what the noble and learned Lord has said. I have no doubt upon the subject.

" Before the Reformation the Provost of Crichton had no right to the vicarage tithes, but the rectorial tithes he had a right to appropriate to himself.

" The effect of the Reformation was to leave the title to the tithes in great uncertainty. Where tithes were not vested in the Crown by the Act of Annexation, the patron took possession of them. The patron of Crichton, in appointing the provost, made such bargain as he chose with him. The act appointing stipends for ministers, authorized the commissioners to prolong the tacks of tithes, when the stipend modified exceeded the amount of the rent.

" Sir Gideon Murray, the provost, granted a tack to William Murray, for his life, and three 19 years after his death, with con-

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sent of the patron and chapter. This was before a stipend was allotted to the minister. Just before this the provost granted a tack of the vicarage tithes also. When the commissioners proceeded to make a provision for the minister, it greatly exceeded the rents reserved to Sir Gideon Murray, they therefore granted a prorogation of the tacks as a compensation, but in process of time, the representative of Sir Gideon Murray, Scott of Branxholm, sold the barony and patronage of Crichton to Sir Adam Hepburn. Sir Adam bought also, from the Elibank family, the tacks of teinds made by Sir Gideon Murray, and prolonged by the commissioners. The Hepburns sold them to the Primrose family. By the instrument in question, they first conveyed the barony and patronage of the provostry, and the lands of the provostry. When the Hepburns warrant the property and the patronage, they make the warrandice absolute; but as to the lands of the provostry, they do not warrant them beyond their own acts and deeds. They then recite all the transactions respecting the lands, and assign all the interest they had in the teinds, and warrant the assignation of the tacks, thereby demonstrating that they had but a defective title to the provostry lands.

"How could a warranty 'during the hail years,' &c., be a warranty of the fee simple of the teinds? But it is said, that the patron, by having the right to appoint a person as provost to receive the parsonage teinds, had right to them himself, and that the provost could appoint a vicar to receive the vicarage tithes; that the baron had the patronage of the provostry, and the provost of the vicarage; that tithes were left without an owner at the Reformation, if acts were not made to dispose of them, and that teinds being, in 1690, by Act of Parliament annexed to the patronage, the person acquiring from the Hepburn's family became entitled to the teinds.

"How is it possible, then, in this view, to conceive that the warranty of the Hepburns could apply to teinds, the right of which was not in the Hepburns?

"An argument was attempted to be raised out of the word 'kindness,' &c., conveyed. This was an indulgence or predeliction only in favour of an old tenant, which could not become a subject of absolute warrandice.

"The interlocutor of the Lord Ordinary, of 15th June 1805, is right, so far as it declared the extent of the warranty, but one part of it is founded upon a misapprehension of the facts. It states 'the terms and years yet to run of the tack,' &c. Now, it is clear, that the tack of the patronage teinds ended in 1737, and that tack was at an end before the augmentation was granted. The tack of the vicarage tithes for his own life, or for the life of William Murray, is at an end. If, for his own life, adding fifty years, it would have expired in 1787.

"It is, therefore, doubtful if the tacks, or any of them, existed at the date of the interlocutor.

"It therefore becomes necessary to find, that so much of the Lord Ordinary's interlocutor as assumes the existence of the tacks be altered, in order to leave the question open."

The LORD CHANCELLOR,

"I move the adjournment of the cause, in order to have time to draw up the precise words of the judgment."

The Lords in Parliament find, that the obligation contained in the disposition of 1682, by Adam Hepburn to Sir William Primrose, extends only to free and relieve the patronage and vicarage teinds, respectively comprised in the tacks and prorogations of tacks, by such disposition respectively assigned, from all augmentations of the minister's stipend, during the hail space and years then to come and unexpired of the said tacks, and prorogations of tacks respectively, and that, therefore, the appellant, James Hepburn, is not bound to relieve the said teinds respectively, after the expiration of the said tacks and prorogations of tacks respectively; and inasmuch as the several tacks and prorogations of tacks of the said parsonage teinds, and vicarage teinds respectively, might expire at different times: Find, that after the expiration of the tacks and prorogations of tacks, of one of the said denominations of teinds, the said Adam Hepburn is bound to such relief only in proportion to the charge of stipend on the other, of the said denominations of teinds, and during so long time only as the tacks and prorogations of tacks of such other denomination of teinds should continue: and it is therefore ordered and adjudged, that all parts of the several interlocutors complained of in the said appeal, which are inconsistent with the said findings, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein what may be just and consistent with the said findings and reversal.

For Appellant, *Wm. Adam, Jas. Moncreiff.*

For Respondent Sir J. Callander, *Sir Saml. Romilly, Tho. Thomson.*

For Respondent Jas. Justice, *Wm. G. Adam, John M'Farlane.*

NOTE.—Unreported in the Court of Session.

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GRIEVE v. CUNNINGHAME, &c.

ADAM GRIEVE, Eldest Son and Heir-at-Law of the deceased William Grieve, Original Lessee of the lands of Barlaugh. } *Appellant;*

Lieut.-Colonel FRANCIS CUNNINGHAME of Dunduff; and (by Revivor) WILLIAM GRIEVE, Ensign in the Ayrshire Militia, Eldest Son and Heir of the deceased William Grieve, second Son of the said Original Lessee. } *Respondents.*

House of Lords, 13th June 1814.

LEASE—"HEIRS," MEANING OF TERM—WHAT IT INCLUDES—ASSIGNEES AND SUBTENANTS.—1st, A lease bore to be to the tenant and his heirs, secluding assignees and subtenants, without the consent of the landlord. The tenant made a will, assigning the lease at his death to his *second* son, who, on his death, claimed the possession of the farm in virtue of it. He was opposed successfully by the landlord; on the eldest son claiming his right, the landlord then came forward and gave his consent to the assignation of the father to the second son. Held this consent to validate the assignation of the lease by the father.

2d. Question, whether "heirs" in a lease can be held to include heirs nominate of the father, or was to be confined to heirs at law?

This case is reported at p. 571 of Volume IV., which see for the particular circumstances of the case.

The question regarded a lease, which bore to be to the tenant and his heirs, excluding assignees and subtenants without the landlord's consent. The tenant had, in contemplation of death, and seeing his *eldest* son to be unfit to succeed him in the farm, assigned the lease, by will, to his second son, William Grieve.

This assignation of the lease having been questioned by the landlord, the second son contended that the term "heirs" in the lease, meant not only heirs-at-law, but heirs in general—heirs nominate, in short any heir whom his father might appoint; while, on the other hand, the landlord contended that it could only apply to the heir-at-law. The Court of Session held that the term heirs could refer only to the eldest son. This judgment was appealed to the House of Lords, and the Lord Chancellor remitted the cause for reconsideration.

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Under this remit from the House of Lords, the following interlocutor was pronounced by the Court of Session, of this date:—"The Lords having resumed consideration of this "petition, and of the order and remit from the House of "Lords therewith produced; and having advised the same "with the mutual memorials for the parties, and having con- "sidered the interlocutors referred to, in the said order and "remit, they adhere to the interlocutors appealed from by "the petitioners." Nov. 21, 1805. In the action of reduction at the appellant's instance, the Court, of same date, pronounced this interlocutor:—"The Lords conjoin the process of reduction "raised by Adam Grieve against William Grieve, with the "process of declarator at the instance of the said Adam "Grieve against Lieut.-Colonel Francis Cunynghame, and "reduce, decern, and declare, in terms of the rescissory and "declaratory conclusions of the libel, against both the "defenders, and decern against William Grieve in the re- "moving."* Nov. 21, 1805.

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—"I think the interlocutor wrong. 'Heirs' simply means *heirs whatsoever*, in any destination of succession, *i.e.*, all heirs entitled to succeed *secundum subjectam materiam*. It is the reverse of a tailzie, where certain heirs alone are called and others cut off.

"Sometimes heirs designative are meant, who take not as actual representatives of their predecessors, but as conditional institutes or as standing in his place by the more legal *jus representationis*, *e.g.*, the case of a legacy to heirs, and where the original legatee has predeceased, the legacy lapses as to him, but is good to his heirs designative; or, suppose I call to my succession, 1st., the heirs of my body, whom failing, the heirs of A. B. or A. B. and his heirs; but A. B. dies before the succession opens to him, and, consequently, before he has any vested right in him, which he can settle or dispose of. But here the right was actually vested in the father when he settled his succession, and the heir named by him had actually succeeded before the special term was elapsed. The construction of tacks, and even feus, originally was very strict, but by degrees this was relaxed. A tack did not at first go to heirs; afterwards, however, they became heritable, and when they did so, tacks were just as much heritable as feus. The tacksman has the same right to regulate his succession that vassals have, although there may be clauses *de non alienando*.

"In tacks it was understood that, although heritable, there was an implied or virtual exclusion of assignees, *i.e.*, of alienation, though not of adjudging. Even this is now confined to tacks of

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An arrangement seems then to have been gone into with William Grieve, by which the landlord consented to allow him to retain the farm, and it was thought at the time, that Adam

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ordinary duration, *e.g.*, nineteen years, but longer tacks require express clauses of seclusion in order to bar assignees voluntary or legal. It may be highly expedient often to exclude adjudgers; but all this had nothing to do with succession. Why should the landlord interfere in the tenant's succession, more than the tenant in the landlord's?"

LORD JUSTICE-CLERK HOPE.—"I am for altering. Heir or heirs in possession, are words which imply a power to name an heir. Assignee is quite a distinct character from heir. The latter takes in his father's lifetime. The words "shall have succeeded to," etc., exclude the supposition of legal succession. On the whole, I am for altering."

LORD WOODHOUSELEE.—"I was formerly for the interlocutor, but now have a doubt, and incline to alter. I am influenced much by the opinion intimated in the remit of the House of Lords. The special words of the tack here do not seem properly to relate to the heir-at-law. The word would have been heirs only if that had been meant."

LORD BANNATYNE.—"I am for adhering."

LORD CRAIG.—"I am for adhering to the strict legal construction of the words in deeds. The words are clear here. The heir means the eldest son. I cannot distinguish between a second son and a stranger, put into possession."

LORD ARMADALE.—"To get at the just grounds of decision, we must throw aside the alleged doctrines here advanced by William Grieve. It is not sufficient with us to *name* an *heir*. The granter must by deeds *dispone*. If Grieve had simply named an heir to his tack, it would have been ineffectual. I also throw aside *sui et necessarii hæredes*. There is no such distinction with us. To come, then, to the case, I think the word 'heirs' here means heir-at-law. The words as to the possession, are expletive only. There must have been many cases to that purpose before Minto's case. There, there is no hint of any such doctrine. If the tenant may give the tack to the second son, it may be given to any one of the children—to a brother, to an uncle, to a stranger. That is a necessary consequence of the doctrine. The same form of deed precisely will suit all these cases. The general principle is, as to all deeds of provision, and more especially mutual contracts. The destination to heirs means heirs of line. In a tailzie to a person and his heirs, it would be a singular doctrine that he could name a stranger heir. More especially is this true in tacks. If not, why does a tack which is conquest, not go to the heir of

Grieve, the eldest son, had acquiesced in this arrangement. Afterwards, however, he thought proper to repudiate this transaction, in so far as he was concerned, and insisted on his

conquest, which is clear. But here, over and above that, is an exclusion of assignees, thus strengthening that destination. In short, it is a favour to heirs of line in all such destinations. A bond secluding executors, brings forward the heir of line, though not named."

LORD MEADOWBANK.—"I was against the judgment in Minto's case. It was always common in practice for the tenant to name his heir. If the word heirs had not been in this tack at all, still it would have gone to heirs. There could not be a *delectus personæ* of the individual heir at the distance of thirty-eight years. He had an interest in an heir who should have a good stock, but none in any particular child. The object of the landlord was merely to give such a grant as would induce the tenants to expend on the land liberally. Exclusion of assignees meant merely to hinder from carrying the tack to the market. The heir to whom a thing is left at death, is neither a legal nor a conventional assignee. It is the interest, both of tenant and landlord, to hold the word heir as meaning heir of provision—that person who shall be a good tenant, and induce a liberal treatment of the land. But it is said, *filius hæres esto* is not a part of our law. But I observe tacks at first excluded charter and sasine. They might have been resigned by procuratory, and a new charter to a new heir goes without the form of assignation. I return to this, that it is not the landlord's interest (to limit the succession thus), so we cannot imply such a purpose. Further, I agree with the Lord Justice-Clerk's construction of the special words, here it implies that the granter had a *choice* of heirs, and even a plurality. I cannot hold these words *pro non scripto*, if I can find a reasonable meaning for them."

LORD HERMAND.—I am for adhering. In Minto's case I thought the judgment right. Words "succeeded to," &c., imply heir-at-law. "Heir or heirs," mean heirs portioners. As to consequences in that case I *care* not for them. There is no hardship in such construction. He may go to the landlord if a deviation from the first purpose is meant. A good landlord will not refuse for his own interest. The tenant's deed here shows that he knew he was doing what he had no right to, and that without an assignation or disposition, his heir-at-law would take. It is a fraudulent and clumsy device. As to Adam, I think it rigorous and not well-founded. He was kept out of possession by the wrong of the father and the neglect of the landlord. I observe further, that there was a liferent tacked to the thirty-eight years. It is

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rights, contending that his brother could not, even *with the consent* of the landlord, retain possession of the farm, nor could Colonel Cunynghame give sucha consent as would prejudice his rights, because the original lease was for thirty-eight years, and if alive at the expiry of that term, for the lifetime of his father, and in case of his death "for the lifetime of the heir or heirs."

It appears, too, that the landlord had procured a renunciation of the lease from William Grieve, the second son, on condition of granting him a new lease. The respondents contended that this was all that was necessary without any interference or consent on the part of the appellant, the eldest son.

On reclaiming petition, therefore, against the above interlocutor, the appellant pleaded that though the stipulation in the arrangement alluded to, had been that Colonel Cunynghame should consent to the assignment of the lease, it could not at all improve the situation of the respondents. For what is the express condition on which the consent is given? It is, that the original lease shall be annihilated, and a new lease granted for such a rent, and of such a duration, as shall be afterwards fixed. Now, a consent to assignment qualified with such a condition is, in truth, no consent at all;

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material to him whether that life is long or short. Such a judgment would affect the construction of the word heirs in a marriage contract. It would enable the father to give his estate, so provided, to a younger son or daughter."

Lord Methven.—"I am for adhering. William's right is by assignation merely."

Lord Cullen.—"I adhere."

Lord Bannatyne.—"The remit from the House of Lords rather acknowledges the general principle of our judgment, and sends back the case on the special words of the tack. I throw out of view the expediency or inexpediency of such exclusions. That is the business of the parties. I think that where a lease is to heirs, and excludes assignees, he cannot assign at his death, under colour of naming an heir. If that be allowed, it will defeat the exclusion of assignees entirely. I am not moved by the special words. "Heir or heirs," is either a careless expression, or means heirs portioners." The Court adhered.

Vide President Campbell's and Hume's Coll. of Session Papers.

At another advising on 18th February 1806, the Court adhered on the merits, but in respect of the landlord withdrawing his objection. The following opinions were delivered on this occasion:—

Lord President.—"By allowing the landlord to interfere with

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for it is downright mockery to call that a consent to a deed, of which the condition is, that the deed itself, and all that is connected with it, shall be *eo epso* destroyed.

The Court were pleased, of this date, to pronounce this interlocutor in the removing at Colonel Cunynghame's instance against William Grieve:—"The Lords having resumed consideration of this petition, along with the conjoined actions of reduction and declarator, at the instance of Adam Grieve against Lieutenant-Colonel Francis Cunynghame, the pursuer in this process of removing; in respect that the said Lieutenant-Colonel Francis Cunynghame has now by petition, dated 10th December 1805, given in by him in the said conjoined process, judicially declared that he consents to the petitioner, William Grieve, being continued in possession of the farm, and to his being assoilzied from the action brought against him; they do assoilzie him accordingly and decern; reserving all other questions which may arise upon the terms or effect of the agreement referred to in the said petition and relative minute."

And in the conjoined action at the appellant's instance against Colonel Cunynghame and William Grieve, the judg-

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the tenant's succession, an unfair transaction seems now to have taken place."

LORD MEADOWBANK.—"See the case for Alexander Ramsay Vallentine, where the landlord's consent was held as not a patrimonial right, which he could convey or sell."

LORD POLKEMMET.—"The proceedings seem to be at an end by this arrangement."

LORD JUSTICE-CLERK.—"We must determine between the two brothers."

LORD HERMAND.—"The landlord's consent comes too late, besides it is qualified."

LORD BALMUTO.—"This is not a continuation of the old lease, but a new lease."

There were six judges to five in finding that the landlord was still entitled to prefer the second son.

Advising, 14*th November* 1806.

Their Lordships alter and find the lease belongs to A. Grieve.

LORD PRESIDENT said,—"The interlocutor I think wrong, as it necessarily follows from that final interlocutor against William Grieve, that Adam must have the right. The landlord's consent comes too late."

Advising, 10*th March* 1807.

Judges alter the previous interlocutor.

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Feb. 18 (Signed 25th), 1806.

ment was as follows:—"The Lords having resumed consideration of this petition for William Grieve, and of the petition for Lieutenant-Colonel Francis Cunynghame with answers for Adam Grieve, and minute for the petitioners, find that Adam Grieve, as the eldest son and heir-at-law of the deceased William Grieve, was entitled, by the terms of the lease in question, to succeed as tacksman on the death of his father; and that he could not be deprived of his said right by any deed executed by his father, without consent of the landlord, and so far adhere to the interlocutor under review; but in respect that the said Lieutenant-Colonel Francis Cunynghame, the landlord, has now, by a petition dated 4th December 1805, judicially declared that he consents to William, the second son, being continued in the possession of the farm, and to his being assoilzied from the actions brought against him, they do assoilzie him accordingly; reserving all other questions which may arise upon the terms or effect of the agreement referred to in the said petition, and in the relative minute; find that the said Adam Grieve having been led to insist in his preferable right as eldest son, in consequence of the proceedings which had taken place at Colonel Cunynghame's instance, which have now been put an end to by the said petition and minute, he is entitled to be indemnified of the expense thereby occasioned, and therefore find Lieutenant-Colonel Cunynghame liable to him in expenses."

Nov. 14, 1806.

On reclaiming petition and answers, the Court pronounced this interlocutor:—"The Lords having resumed consideration of this petition and answers thereto, alter the interlocutor reclaimed against, and adhere to the interlocutor of 21st November 1805, reduce, decern, and declare in terms of the rescissory and declaratory conclusions of the conjoined libels at the petitioner's instance against both the defenders; find the defenders conjunctly and severally liable in the expense incurred since the date of the said interlocutor, 21st November 1805, without prejudice to their relief against one another as accords: appoint an account thereof to be given in," &c.

Mar. 10, 1807.

Against this judgment the respondent, William Grieve, reclaimed, and the Court, after ordering answers, finally pronounced this interlocutor:—"Alter their interlocutor of the 14th November last, and return to their interlocutor of the 18th day of February 1806 years, in so far as they assoilzie the petitioner (William Grieve) from the process of remov-

" ing brought against him by Colonel Cunynghame, and from " the action of reduction, removing and damages brought " against him by Adam Grieve, and of new assoilzie him from " both these actions, and dismiss the process of declarator at " Adam Grieve's instance, but refuse this petition *quoad ultra*, " and adhere to these last mentioned interlocutors, in so far " as they find that Adam Grieve is entitled to expenses," &c.

The appellant brought his appeal to the House of Lords against this last judgment, and likewise against the preceding interlocutor of the 18th February 1806, so far as they gave effect to the transaction between Colonel Cunynghame and William Grieve, and assoilzie William Grieve, and dismiss the action of declarator at the appellant's instance.

Pleaded for the Appellant.—The lease was for thirty-eight years certain, and in case of the death of William Grieve, senior, during that period, for the lifetime " *of the heir or heirs of the* " *said* William Grieve, who shall, at the end of the said thirty- " eight years, have succeeded to, and shall then be in pos- " session of, the said lands." Now as far as regarded this life-rent lease, William Grieve, senior, could not, even with the consent of the proprietor, execute a valid assignation, for by such deed he could give nothing; because its necessary effect being to exclude the heir-at-law, there could not be an heir who had succeeded to the possession of the lands. The deed must therefore have been inept; it could not carry anything to the assignee, and, consequently, the right of the heir must have remained the same as if it had not been granted. No consent of the proprietor, therefore, even though granted at the instant of executing the deed, could give it efficacy, or affect the right of the appellant as the heir-at-law, who alone had right to succeed to the lease.

Pleaded for the Respondents.—1. The claim at the instance of the appellant is utterly groundless, as it is advanced by a person who does not hold the slightest interest in the lease, which it is the object of the action to enforce. The lease was granted to William Grieve, senior, for the term of thirty-eight years, and the lifetime of himself, " or his heir who should " have succeeded to, and should be in possession of, the farm." When that period had elapsed, William Grieve, junior, succeeded to his father in virtue of the deed by which he was nominated and appointed, " heir entitled to succeed in the " lands of Barlaugh and Halkerston," and by which the tacks are disponed to him, with the express exclusion of Adam Grieve, the appellant. The life interest, therefore, commenc-

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ing at the termination of the thirty-eight years of specific endurance, was completely vested in William Grieve, junior, as heir of his father in possession of the farm; and that life interest having suffered a double extinction by his renunciation and by his death, the lease is now completely at an end, and the farm restored to the actual possession of the respondent. 2d. Even supposing that the term "heir," as used in the lease, did not apply to William Grieve, junior, the heir nominated by the deed; and that this nomination amounted, therefore, to a departure from the stipulation of the lease; that deviation from the order of succession established by the lease, could only be called in question by the landlord, and could afford no objection against William's possession available to the heir-at-law. It is in favour of the landlord alone, that such a restriction of the succession to the heir-at-law can be understood to operate. And the ground upon which he is entitled to challenge the assignation is, that the farm is transferred to a person to whom he is not obliged. The right to urge this objection is, from its very nature, confined to the landlord; and the heirs of the tenant have no *jus quæsitum* to insist otherwise; because this right to challenge the assignation, contrary to the terms of the lease, was personal to the landlord. It was so found in Marquis of Tweeddale *v.* Hay, 8th December 1801. The consent, therefore, of the landlord was alone sufficient to validate the right in William Grieve.

Fac. Coll. et M. p. 15, 297.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Saml. Romilly, John Greenshields.*

For the Respondents, *John Fullerton, Francis Horner.*

THOMAS MITCHELL, Soap-Manufacturer, Dunbar, - - - - - *Appellant.*

Messrs JOHN JAMIESON and SONS, Merchants in Leith, - - - - *Respondents.*

House of Lords, 15th June 1814.

SALE—MARKET PRICE—MISREPRESENTATION—COMPENSATION.—Circumstances in which a purchaser of tallow was held not entitled to object to the sale on the ground of alleged misrepresen-

tation as to the market price of the article at the time of the bargain, and his plea of compensation repelled. Affirmed in the House of Lords.

The appellant, a soap manufacturer, had dealt with the respondents in tallow during several years.

On the 12th of November 1804, the respondents wrote the appellant, making an offer to sell him twenty or thirty casks of best yellow tallow, at £74 per ton, or 74s. per hundred-weight, and six months' credit, concluding in these words:— "To wait your answer in course; that price, we do assure "you, is under the present price of the market, Kerr and "Pillans having sold, within these few months, several "hundred-weight at 74s. per hundred-weight, four months. "Scougall and other holders will not sell at £75 per ton." Nov. 12, 1804.

The appellant, though, as he stated, sufficiently supplied with tallow, was induced by the representation of the respondents as to the price, to offer them 73s. per hundred-weight for twenty casks. On the 19th November, they replied to him in the following terms:—"Yours of the 17th we are duly in receipt "of. Our offer, we can assure you, as markets are going for "tallow, you ought to consider very fair at 74s. per hun-"dred-weight, as many sales are making at 75s.; and 74s., "three months. Many holders will not sell at these prices, "and there is little now for sale. As we consider you one of "our best customers, and to show we wish to deal with you, "we shall half the difference, and make the invoice out at "73s. 6d., six months. Annexed you have the particulars "of the same, and bill for acceptance per £549, 2s. 6d., "which beg you will do the needful with, and return it to "yours," &c. Nov. 17, 1804. Nov. 19, 1804.

The appellant further stated, that, relying on the respondents' assurances as to the current price of tallow, he accepted the bill as the price of the twenty casks; but that, in less than three days, he found that he had been imposed on, for, of this date, he received a letter from Mr Sanderson, agent at Dunbar for Messrs Ramsay, Williamson, and Company, Leith, stating —"I am desired by Messrs Ramsay, Williamson and Com-"pany to inform you they can supply you with tallow— "candle tallow—at 71s., credit, and that they sold soap tallow "at 67s., credit. I will be much obliged to you to give an "order." He was also informed that the respondents had purchased the tallow in question recently before from Ramsay, Williamson and Company, at a price below what the respon- Nov. 22, 1804.

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dents had represented the current country price to be. In these circumstances he resolved to have deduction from the respondents, and for this purpose he bought other two casks at 71s. per hundred-weight, which offer the respondents accepted.

The respondents refused to give deduction for any overcharge of price of the twenty casks out of the price of the two casks; and the appellant refusing to pay without such deduction, the respondents raised the present action.

In defence to this action, the appellant stated his claim of deduction for gross overcharge, and to that extent compensation was pleaded, expressing his willingness to pay the balance.

Dec. 13, 1806. The Lord Ordinary (Glenlee) repelled the defences, and decerned; and afterwards, on representation, answers, &c., he

July 7, 1807. pronounced this interlocutor:—"Finds that, although the "defender does state, and state truly, that the certificates "produced by the pursuers are not legal or admissible evi- "dence of the entries in the books of Ramsay, Williamson "and Company, and other merchants, respecting the price at "which they made sales of tallow at the period to which the "dispute between the parties relates, yet he does not expli- "citly aver that the entries in the books of the said merchants, "or in those in the pursuers themselves, are different from "what the pursuers state them to be. Finds it admitted by "the defender that, within three days of his having concluded "the former bargain, on the 19th of November 1804, he was "fully apprised of the circumstances on which he now founds, "in order to show that, in said former bargain, the pursuers "had overcharged the tallow, and that nevertheless he made "no complaint to them whatever, but, on the contrary, with- "out saying a word, made a new purchase from them, on the "6th December 1804, of the tallow for the price of which "the present action was brought; further, that although his "bill for the price of the tallow purchased on the 19th of "November remained all along in the hands of the pursuers "themselves, yet, when it fell due, at the distance of six "months, it was paid by the defender's banker without any "objection whatever. And the Ordinary is of opinion that, "under these circumstances, the defender's plea of compensa- "tion on account of the alleged overcharge on the price of "the tallow purchased by him on the said 19th November "1804, cannot now be listened to. And on the whole matter, "refuses the said representation, and adheres to the interlo- "cutor complained of. Finds the defender liable in expenses,

" and remits to the auditor to ascertain the amount thereof, " and to report. Supersede extract till November next."

The Lord Ordinary refused short representations of these dates. On reclaiming petition to the Court, their Lordships adhered.

From these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant was induced to make the purchase of the tallow in question at the price mentioned by the representations of the respondents, that such was below the market-price. These representations were false and fraudulent; the contract, therefore, was invalid, and the appellant is entitled to compensation to the extent of the difference between what he paid, and the actual average market-price at the time, which price only he intended to give, and for which he was fraudulently persuaded by the respondents to believe he was actually contracting. 2d, He did not surrender his right to demand such compensation by paying his bill when due, as any person holding that bill, for a valuable consideration, could have compelled him to pay it. 3d, There is no evidence that the sales made by the merchants mentioned by name were such as the respondents held out; but if there were, these sales would not prove the market-price; and it was by the representations of the respondents as to the market-price, that the appellant was induced to make his purchase at the rate he did. 4th, The circumstances of the price at which the respondents bought these goods, the price at which they sold him the last parcel, and the price at which Messrs Ramsay, Williamson and Company, offered to supply him,—were sufficient proof of what the true market-price actually was. But if not, the appellant offered to prove that the market-price was such as he stated, and this averment he ought at least to have been admitted to support by competent evidence.

Pleaded for the Respondents.—The defence set up by the appellant is irrelevant and inadmissible. Besides, on the merits, the letter of the respondents, which offered the appellant twenty casks of tallow at 74s. per hundred-weight, is dated the 12th November. The letter of the agent of Messrs Ramsay, Williamson and Company, which informed him that they had tallow for sale at 71s. per hundred-weight, is dated 22d November. Of an article, the price of which frequently fluctuates, it does not follow that the market price was not 74s. upon the 12th November, because a particular house offered it at 71s. ten days afterwards. But if any inquiry

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could be instituted upon this ground, the representation of the respondents was to be judged of, not by a letter of the agent of Ramsay, Williamson and Company, but by the sales of that house at the period in question; and the respondents asserted that the sales of this house, at this period, proved the truth of the representation made by them, as the following note of the sales of this house, from the 5th November to 6th December 1804, established. [Here the note of sales was given.] But further, this letter of the agent of Ramsay, Williamson and Company, was received by the appellant, two days after he had sent his acceptance for the tallow in question, but before that tallow was delivered. If the circumstance of which he was therein apprized, could have any effect upon his bargain with the respondents, he might and ought to have refused to receive the tallow, and have insisted to have his acceptance delivered up to him. At all events, they ought to have been immediately apprized of it; but according to his statement, as the truth was, they were not apprized of it until a demand was made for payment of the two casks of tallow, for which the present action was brought; that is, not until the month of January 1806, upwards of a year afterwards. The receiving delivery of the tallow in question without complaint, after the appellant was in possession of the ground upon which he has now attempted to raise an objection, was of itself alone sufficient to negative his present defence. Besides, he might have insisted for redelivery back of his bill. A bill at six months could not be discounted within two days after its date. The bill was still in the respondents' hands; at all events, he might have received the tallow under protest, or upon notice reserving his objection. He did not bring an action for redelivery of the bill. He did not reject the tallow. He did not even receive it under protest. He takes it, and gives no notice whatever of the objection as to the fairness of the bargain and sale. Instead of this, he orders two casks more at 71s. per hundred-weight, maintaining a perfect silence at the time, of his intention to claim deduction from the price of these of the alleged overcharge. These, the respondents contend, are circumstances, which, in law, totally exclude the claim made by the appellant.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Saml. Romilly, J. P. Grant.*
For Respondents, *M. Nolan, W. G. Adam.*

NOTE.—Unreported in the Court of Session.

JAMES JAMESON, Merchant, Leith, - *Appellant;*

JOHN RUSSEL and JAMES THOMSON, Builders in Leith, - - - - *Respondents.*

House of Lords, 17th June 1814.

FEU CONTRACT FOR BUILDING—STIPULATION—ARTICLES OF ROUP—PLAN—DECREE ARBITRAL.—In a sale of feus for building houses, there was a stipulation in the articles of roup, that the houses built should be conform to a uniform plan, and of a certain elevation. The respondents, builders, purchased the ground for building, and proceeded to erect their houses. In a suspension and interdict, held that they had not, in substance, deviated from these conditions as to building. Affirmed in the House of Lords, with £170 of costs.

A sale of feus for building houses of grounds on Leith Links, was made by the appellant to the respondents, builders in Leith, in which there was a stipulation in the articles of roup, that the houses built should be conform to a uniform plan, and of the elevation of 39 feet in front, and a plan was drawn out and subscribed, as relative thereto.

It appeared that the builders, as they proceeded to build the houses, found that an alteration, both on the levels and on the elevation of the cellars of the houses would be necessary, and these, no sooner than discovered, were communicated to the appellant, and his acquiescence obtained to the several deviations as they occurred. A new plan was made out, embracing these elevations, and it was subscribed by the appellant, and lodged in the Dean of Guild's office.

Even this latter plan was not strictly adhered to; because when the respondents began to build, several alterations occurred to them as desirable, which they communicated to the appellant, and he yielded in many respects to these alterations. The alterations to which the appellant consented were: 1st, Front to be rustic work, instead of plain; 2d, Cellar windows permitted, contrary to the plan, &c. Accordingly, in these circumstances, four houses on the west were actually built and finished, with the alterations now specified and sundry others, but there was no alteration made on the height of the side or gable walls, which, by the articles of roup, were stated to be

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at 39 feet. The buildings thus erected were seen in their progress by the appellant, passing and repassing to his dwelling house every day, and as they were carried on from beginning to end with his knowledge, and consent, and approbation, so they were allowed to stand before his eyes for a period of almost three years unchallenged.

In proceeding with the other buildings on the east area, they were resolved to build the houses perfectly uniform with those already built on the west area, when they were interrupted by the appellant, on the ground that they were deviating from the plan. A variety of procedure followed, with a reference made to Lord Newton, who issued a decree

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arbitral, finding "that the third article of the conditions of "roup must be the governing rule for ascertaining the "height of the houses to be built thereon," and which declared the height not to be more than thirty-nine feet in front; but, not satisfied with this, he presented a bill of suspension. Lord Balmuto pronounced this interlocutor:— "Having advised the bill of suspension and interdict for "James Jameson and Others, with the answers for James "Thomson and John Russel, replies thereto, with the sub- "mission and decree arbitral betwixt the parties, the report "by Messrs Laing and Burn in terms of the decree arbitral; "in respect, it appears to the Lord Ordinary, that the question "in dispute relates to the elevation or height of the side walls "of the houses building by the respondents, from the level of "the ground on which they are erected, and which, from the "articles of roup and decree arbitral founded on, is declared "to be thirty-nine feet; and as the report above mentioned, "ordered by the arbiter, ascertained the level of the ground "from which the height is to be taken, to be four feet three "inches below the under bed of the base course already laid; "and as the plan in process referred to by Messrs Laing and "Burn, as relative to their report, ascertains that the side "walls of the respondents' building are to be conform to the "said plan, and do not exceed thirty-nine feet from the level "fixed upon by the reporters, refuses the bill, and removes "the interdict, but finds no expenses due to either party."*

* Note by the Lord Ordinary:—

"It does not appear to the Lord Ordinary, that there is any "ground of complaint that the intermediate stories of the houses are "not exactly the same as those built upon the opposite side of the "square, provided the height of the side walls do not exceed thirty-

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Against this interlocutor the appellant reclaimed to the Court; and the Court, after remitting again to the Messrs Laing and Burn, to give in a report on special points specified, finally adhered to the Lord Ordinary's interlocutor reclaimed against, with expenses. And a further petition was also refused.

Mar. 3, 1810.

Mar. 10, 1810.

Against these interlocutors the present appeal was brought to the House of Lords.

But the House of Lords, after hearing counsel,

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £170 costs.

For Appellant, *William Adam, Ja. Abercromby.*

For Respondents, *Sir Saml. Romilly, Thos. W. Baird.*

NOTE.—Unreported in the Court of Session.

Sir ALEXANDER MACDONALD LOCKHART of Lee and Carnwath, Bart., - - *Appellant.*

Sir CHARLES ROSS of Balnagowan, Bart., and HENRY JARDINE, Esq., Executors and Legatees of Charles Lockhart Wishart, Count Lockhart, deceased, and ROBERT LOCKHART, Esq., - - - - - *Respondents.*

House of Lords, 1st July 1814.

TESTAMENT—CONDITIONAL INSTITUTION OR SUBSTITUTION—MOVEABLES—HERITABLE DESTINATIONE.—A party conveyed to his son, and his heirs, executors, and assignees, his whole heritable and moveable estate, including his whole "jewels, silver-plate, "pictures, marbles, alabasters, &c., and all kinds of household "furniture, and in general all goods and gear belonging to him "at the time of his death." Of same date he executed a deed, expressing his will and intention to be, that, in the event of his dying without leaving heirs-male of his body, the furniture, silver-plate, and pictures in his mansion-houses of Dryden and Carnwath, should go to the heir of entail succeeding to these estates of Dryden and Carnwath, and assigned and disponed the

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"nine feet. The letter from the feuars, addressed to Mr Jameson, "intimates their desire, that the level of the first floor might be four "feet above the level of the ground, on which it is presumed Mr "Jameson acquiesced; and the difference betwixt that which was "there proposed and the height of the first floor as now erected, is "only three inches, according to Messrs Laing and Burn's report."

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same to these collateral heirs-male accordingly. His son survived him, and executed a deed bequeathing otherwise this moveable estate. Held that this was a conditional institution, and not a substitution, and that the son, on succeeding, was entitled to dispose of the property as absolute proprietor, in any way he might think proper.

James, Count Lockhart, was possessed of the estates of Carnwath and Dryden, held under strict entail.

He held other estates in fee-simple, and possessed considerable personal estate, as well as the furniture, pictures, library, &c., in his family mansion-houses of Dryden and Carnwath.

Jan. 9, 1782. He made, of this date, his will, by two separate instruments, which were stated to have been written out and framed by the same person, executed on the same day, and attested by the same witnesses.

By one of these instruments he assigned and disponed, "to "and in favour of Charles Lockhart, his only son, and *his* "*heirs, executors, and assignees*, all and whatsoever debts and "sums of money, heritable and moveable," &c. "As also "jewels, *silver-plate, pictures*, marbles, alabaster, china ware, "bed and table linen of all kinds, *household* furniture, out-"sight and inside plenishing, corns, cattle, horse, &c., and in "general all and sundry goods, gear, and effects, of whatever "kind, quality, or denomination, which should pertain and "belong to him at the time of his death;" subject to the payment of his debts and any legacies he might leave by a writ under his hands.

The other instrument set forth that, considering "that I "have for several years past expended considerable sums of "money in furnishing my house of Dryden; and it being my "will and intention, *in the event of my said estate going to a* "*collateral heir through the failure of issue-male of my body*, "that not only the furniture in the house of Dryden, but also "the furniture in my house at Carnwath, should remain "therein, and fall and belong to the same series of heirs ap-"pointed to succeed to my said entailed estates, do therefore, "*in the event of the failure of issue-male of my body*, assign "and dispone to and in favour of Charles Macdonald Lock-"hart, Esq. of Largie, my brother-german, and the heirs-male "of his body, whom failing, to the other heirs and members of "entail mentioned in the foresaid deed of entail, according to "the order of substitution therein specified, all and every move-"able article whatever which shall be in my houses of Dryden "and Carnwath, particularly the household furniture, plate,

"and pictures, of whatever kind, quality, or denomination, "that shall be in the said houses at the time of my death."

James, Count Lockhart, the testator, died in 1790, without altering these instruments. He was survived by his son, Charles, named in the first instrument, who, in virtue of that deed, confirmed to, and took possession of the moveable estate so conveyed.

On 21st June 1802, Charles, now Count Lockhart, made a will, conveying his whole property, real and personal, to the Earl of Moray and the respondents, Sir Charles Ross (his brother-in-law) and Mr Jardine (his confidential law-agent), in trust for payment of his debts, making special bequests of all his wines in his cellars at Dryden to Lord Moray; all his plate and family pictures to the respondent, Robert Lockhart, Esq.; a set of Dresden china to Mr Jardine; and the residue of his personal estate to Sir Charles Ross—naming them as executors of his will.

He died in about forty days after the execution of this deed; and the appellant conceiving that he had right to succeed to the whole furniture, silver-plate, pictures, &c., in the mansion-houses of Dryden and Carnwath, assigned by the deed second above recited, brought an action of reduction to set aside the conveyance made by Charles, Count Lockhart, the son, before his death.

The reasons of reduction were—1st, That by the instrument second above narrated, connected with the other settlements, there was created a substitution of the appellant as heir of entail, failing the heirs-male of the general's body, implying a prohibition of gratuitous alienation to the prejudice of the substitutes. 2dly, The trust-deed or will by Count Charles in favour of the respondents was executed by him when on deathbed, and therefore flowed *a non habente potestatem*—the subject being *heritable destinatione*. And 3dly, With regard to the silver-plate, family pictures, household furniture, books, and china at Dryden, which are excepted from the dispositive clause in the said trust-disposition, and bequeathed to Mr Lockhart, Sir Charles Ross, and Mr Jardine, the trust-deed contains no disposition, but they are merely bequeathed as legacies, which is not sufficient to convey moveables made heritable *destinatione*.

The defence stated to this action was, that by the conception of the instrument on which the appellant founded, there was only a conveyance of the furniture, &c., therein mentioned, to the collateral heirs of entail, in the event of his surviving

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his son, or dying without issue-male of his body; but that the son having survived his father, the instrument fell to the ground, leaving the son to take as absolute proprietor. The conveyance, therefore, to the appellant was conditional, and only to take place on an event which never happened. Substitutions in moveables have no place in the law of Scotland; and the estate conveyed here was moveable, in so far as the appellant professed an interest in it.

Mar. 2, 1809. The Lord Ordinary (Hermand) pronounced this interlocutor:—"Finds that by disposition and settlement, 9th "January 1782, General James Lockhart Wishart, con- "veyed to his son, Charles Lockhart Wishart, his jewels, "plate, chinaware, and the whole other moveables of whatever "description, under which deed, if never revoked, the said "Charles Lockhart Wishart became unlimited proprietor of "the said moveables; finds that on the same day, and, per- "haps, at the same moment at which the said James Lock- "hart Wishart had disponed his whole moveables to the said "Charles Lockhart Wishart, his executors or assignees, he "executed another deed nowise inconsistent with it, and "which the pursuer states as making part of one and the "same deed, by which, in order to provide for the event "that, by the predecease of his son, the former deed should "not have effect, he declares his intention, that 'in the event "'of my estate going to a collateral heir, through the failure "'of issue male of my body,' the furniture in the house of "Dryden, stated by the pursuer (appellant) as of great value, "and that in the house of Carnwath, of which less has been "said, should belong to the heirs of entail, and 'in the event "'of failure of issue male of my body,' dispones to Charles "Macdonald Lockhart, his brother, and the other heirs of "entail in their order, every moveable article whatsoever, "which should be in the houses of Dryden and Carnwath, "with some exceptions unnecessary to be here particularized, "substituting the said Charles Macdonald Lockhart and the "other heirs of tailzie, 'in the event of my dying without "'issue male of my own body.' Finds that Charles Lock- "hart Wishart expede a confirmation under the general dis- "position and settlement, whereby the moveables thereby "disponed were completely vested in his person; finds that the "said disposition and settlement was not revoked or altered "by the other deed executed *unico contextu* with it; and that "Charles Lockhart Wishart having survived his father for "years, was entitled to dispose of the moveables as he thought

" fit, subject to no challenge, or if to any, not at the instance " of the pursuer (appellant), a collateral heir of entail; finds " that, as to that part of the moveables which may be con- " sidered as heirship moveables, descendable to the heirs of " line, the pursuer, as heir of entail, has no title to pursue; " finds, that having no interest, so far as the Lord Ordinary " has been able to judge, in the disposal by General James " Lockhart Wishart of the moveables, confessedly belonging " to him, and which moveables he conveyed to his son, to " whom, or to his other nearest of kin, they would, indepen- " dent of such disposal, have belonged, the pursuer has no " title to enquire into the validity of the conveyance of these " moveables by Charles Lockhart Wishart; sustains the " defences, assoilzies the defenders and decerns."

On representation, the Lord Ordinary adhered. And, on reclaiming petition, the Court adhered, and afterwards found the appellant liable in expenses. July 11, 1809. Nov. 14, 1809. Dec. 7 and 23, 1809.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The first question for your Lordships' decision in this cause is, whether, by the just construction of the testamentary instrument left by James Count Lockhart, in favour of his brother, and his other collateral heirs of entail, the operation of it was confined to the event of his son's dying before him, or of his own death, without leaving male descendants, or whether it was to operate, in the case, which actually occurred, of his dying, leaving male issue, and that issue afterwards failing?

How it came about that Count James made his will in two parts, or on two separate pieces of paper, can only be conjectured. It might be owing to the writer's thinking the testator's meaning could be more distinctly expressed in that way; or the Count might wish to have it in his power to destroy the one if his mind changed, while he preferred the other; but it seems perfectly clear, that both instruments must be taken into consideration together as parts of the same will, and forming one whole, and therefore, that it was wrong in Count Charles (allowing his motives to have been pure), to suppress or keep back one of the parts, while he brought forward the other.

The respondents represent the two instruments as totally distinct, and intended to meet different events; the one to give to Count Charles, if he survived the testator, the whole of the testator's moveable property absolutely; the other to give to the

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heirs of entail the furniture, in case the testator had no male descendants living at his death. But in the first place it is very difficult to conceive that the testator, when declaring his will and intention to be, that, in the event of his estates going to a collateral heir, the furniture in his mansion houses should go with the inheritance or entailed estates, without saying by what occurrence that event should take place, whether by his own death without male descendants, or by the after failure of such descendants, should, at the very same moment, declare that he had no such will or intention, if his son should happen to survive him a single day; for to that length the respondents' argument goes.

After the testator gives and dispones (in the dispositive clause) to his collateral heirs (his brother, &c.,) *in the event of the failure of issue male of his body*, he is made to surrogate, and substitute his said disponees in his full right and place in the premises *in the event of his dying without issue male of his body*. But the phrases are in truth synonymous, or if there be any difference, the last must yield to the first; and the dispositive clause must govern. 2d. If, therefore, the deed in favour of the collateral heirs created a substitution, it is plain that it could not be defeated by a deathbed deed, the right being made heritable *destinatione;* for, supposing that Count Charles had died intestate, the appellant must have made up his title by service, and not by confirmation; and, for the same reason, the right could not be carried either by a deathbed deed, or by a testament. The general rule is, that heritage cannot be conveyed either by the one or the other, and it applies to subjects though in their nature moveable, if they pass by service, and are made heritable *destinatione.*

Pleaded for the Respondents, Sir Charles Ross and Robert Lockhart.—1st. Though substitutions, in moveable subjects, are not altogether unknown to the law of Scotland, the presumption of that law is clearly against them; and it is the settled rule of our practice, that they are never to be presumed *in dubio*, or to be admitted without the most express words to that effect. This is reported as the result and summary of the latest case which appears in any collection, *Vide* Brown *v.* Coventry, 2d June 1792, (Fac. Coll. vol. 10, p. 447; Mor. 14,683 et Bell 310), and appears under this title or marginal argument in the Faculty Collection. "Substitution "of heirs *may* take place in moveables, but not to be admitted "without express words." See that case accordingly and in other cases, Lutfit *v.* Johnstone, 4th February 1642, (Mor

14,847); Lamerton *v.* Plendergaist, 16th July 1679, (Mor. p. 14,848); Hamilton *v.* Wilson, 8th December 1687, (Mor. 14,850); Dickson *v.* Stevenson, 23d February 1697, (Mor. 14,851); Stevenson *v.* Barr, 24th June 1784, (Mor. 14,862); where a *destination* having been made in one and the same deed to an individual (without any mention of his *executors* or *assignees*), whom failing to certain other persons, it was decided that this imported only a conditional institution of the persons last named, and that they had no right or claim whatever to the subject, if the party to whom it was first given only survived, and took it up. 2d. But in the present case, not only is there every presumption, from the relationship of the parties, that Count James Lockhart meant to give his son as absolute and complete a property in the moveables in question as he himself had, and to create a substitution only in the event of his never surviving to take up that property, but this intention seems to be evidenced in the strongest manner, by the circumstance of his making this absolute, and unlimited conveyance of them by a *separate and distinct deed* from that in which the conditional institution and substitution is contained. It is very true, that in seeking to expiscate intention, it may be very proper to take both deeds into consideration together, and to endeavour to construe them into one rational and consistent settlement, but it is a circumstance of *fact* very material to the discovery of this intention, that the alleged substitution of Charles Macdonald Lockhart, and the collateral heirs of entail to the granter's own issue male as institutes, is contained in a separate deed. 3d. Besides, the whole question is set at rest, by the express words of the deed, which gives to these collateral heirs-male, the moveable property in the mansion houses of Dryden and Carnwath only "in the "event of my dying without issue male of my own body."

Pleaded for the other Respondent, Mr Jardine.—Mr Jardine gave in a separate case specially directed to rebut some insinuations as to the manner in which the deed was framed and executed by him. In the summons of reduction there was no allegation of fraud or undue advantage having been taken, and the insinuation made was satisfactorily refuted, but this part of the case had no bearing on the point of law decided, and therefore is not given.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

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WRIGHT v. PATERSON.

For the Appellant, *Sir Samuel Romilly, John Clerk, W. Macdonald.*

For the Respondents, *Sir Charles Ross, Robert Lockhart, Thos. W. Baird, F. Jeffrey.*

NOTE.—Unreported in the Court of Session.

[13 Fac. Coll. p. 54–6.]

ADAM WRIGHT, Esq., late of Glasgow, now of Edinburgh, ... *Appellant.*

DUGALD PATERSON, Merchant in Glasgow, . *Respondent.*

House of Lords, 4th July 1814.

GUARANTEE—CAUTIONARY OBLIGATION—LEX MERCATORIA—STATUTORY SOLEMNITIES.—A letter of guarantee was granted, having reference to past as well as future contractions. In an action against the cautioner, Held that this was not a cautionary obligation, requiring to be attested in terms of the statutes, but a letter of guarantee *in re mercatoria*, and therefore constituted a valid obligation. Affirmed in the House of Lords.

The appellant granted to the respondent a letter of guarantee for Messrs Simpson and Co., manufacturers in Glasgow, in the following terms:—

"*Glasgow, July* 13, 1806.

"MR D. PATERSON,

"Sir,—I hereby bind myself to see you paid for whatever purchases of cotton yarns, &c., Messrs Joseph Simpson and Co. has made, or may make, from you, for twelve months to come from this date.—I am, yours,

(Signed) "ADAM WRIGHT."

The respondent had delivered cotton yarns to Joseph Simpson and Co. per account, to the amount of £621, 7s. 4d. £229, 17s. 5d. of these yarns had been delivered *prior to the date of the letter*, and the rest after its date.

Simpson and Co. having become bankrupt, and an action having been raised, against the cautioner, for payment of the whole amount of £621, 7s. 4d., the defence stated was, that all obligations of this nature require to be attested by witnesses, and the name of the writer mentioned in the instrument in terms of the statutes thereanent. In reply, it was pleaded

that the writing founded on was an obligation granted *in re mercatoria*, and was therefore an exception to the general rule established by the statutues.

The Lord Ordinary at first pronounced this interlocutor: Dec. 5, 1807. "Finds that the letter founded on by the pursuer, is not a "letter *in re mercatoria*, in so far as regards the furnishings "made to Simpson and Co. *prior to the date of it;* but is a "proper cautionary obligation for payment of a debt already "due. Finds that the letter is a sufficient guarantee for the "subsequent articles of the account, which were all furnished "within twelve months after the date thereof. Finds that "the two first articles of the account, furnished prior to the "date of the letter, amount together to the sum of £229, "17s. 5d. Sustains the defences pleaded for the said defender, "and assoilzies him from the action, so far as regards these "two articles, and decerns; but repels the defence, *quoad ultra*, "and finds the defender, Adam Wright, liable to the pur-"suers for the amount of the other articles of the account, "being £391, and for the interest thereof, from the period "libelled, and in time coming, during the non-payment, and "decerns."

The appellant lodged a representation, but the Lord Ordi- Dec. 18, 1807. nary adhered, declaring, "That it was the meaning of the "Lord Ordinary to declare, by his interlocutor, that the "letter in question being properly a cautionary obligation for "a debt already incurred, could not be held to be a letter of "guarantee, as *in re mercatoria;* and, with this explanation, "refuses also the second prayer of the representation, super-"seding extract till the third sederunt day, in January "next."

The respondent, on his part, thereafter represented, and the Lord Ordinary pronounced this interlocutor: "In respect June 14, 1808. "it is admitted that the two first articles of the account pur-"sued for, and from the claim for which the respondent "stands assoilzied by the interlocutor brought under review, "were furnished by the representer to Simpson, previous to "the date of the respondent's letter of guarantee to the repre-"senter Simpson—Finds, that the said letter can be con-"sidered in no other light than as a cautionary obligation by "the respondent (appellant) to the representer, for the "amount of these two articles; finds, that a cautionary obli-"gation for a debt already and actually due, cannot be held "to be *in re mercatoria*, or to be validly constituted by a "writing defective in the legal solemnities. And as it is not

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"alleged that the representer's letter of guarantee pursued "on, is either holograph, bears the writer's name, or is signed "before witnesses, adheres to the former interlocutor, and "refuses the desire of the representation, and prohibits any "more representations from being received."

Feb. 16, 1809. July 4, 1809.

The respondent then reclaimed to the Second Division of the Court, but the Court adhered. On further reclaiming petition by the respondent, the Court *altered* "the interlocu- "tor complained of; repel the defences pleaded against the "first articles of the account libelled on. Find the defender "liable to the pursuer for the amount thereof, being £229, "17s. 5d., and for the interest thereof as libelled, and decern; "superseding extract till the first box-day in the ensuing "vacation; and if a petition shall then be printed and boxed, "supersede further until that petition shall be disposed of." *

* Opinions of the Judges:—

LORD MEADOWBANK.—"The law of Scotland bends to the *lex mercatoria* for the facility of commerce, and on this principle, there is strong reason to doubt the judgment. A letter of guarantee is as often given on account of a transaction finished, as on account of future furnishings; because a person will often furnish no more unless he is guaranteed for payment of what he has already advanced. This is done every day by bills, and by ordinary letters *in rebus mercatoriis;* and it would be detrimental to commerce to require regular writings in transactions of frequent occurrence. By a bill which is neither holograph nor tested, a cautionary obligation might, undoubtedly, have been undertaken; and there is no very good reason why it should not by a missive letter. But this case is still stronger; of two obligations (one of them confessedly valid), both are contained in the same sentence. The second never would have been acted upon without the first. It extended credit to the future transactions. There is, therefore, a *rei interventus.* The guarantee of the first was relied upon when credit was given for the future."

LORD GLENLEE.—"I am for altering; I think the guarantee of past transactions is *in rê mercatorid.* The only criterion of what is so is, What is necessary for explication of mercantile business? In that view, I cannot distinguish between past and future transactions. The situation is frequent; and to give a bond for the one, and a missive for the other, is quite unnatural. If a bond were taken at all, both would be thrown into it. A letter of credit for a sum advanced, including former advances, is very ordinary, and has always been held good. The making of the further advances proceeds on that faith, and the transaction occurs daily, and is quite natural."

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On reclaiming petition by the appellant, the Court adhered, and found the defender liable in expenses, subject to modification.

On further reclaiming petition, the Court adhered, but corrected their interlocutor in regard to the point of expenses, and remitted to the Lord Ordinary, to adjust and determine as to these. This being done,

The appellant brought his appeal to the House of Lords against these interlocutors.

Pleaded for the Appellant.— By the authority of the Scottish statutes, 1540 c. 117; 1579 c. 80; 1593 c. 175; 1681 c. 5; the writing founded on by the respondent is null and void, because it is not attested by witnesses named and designed in it, and, because, the name of the writer of the document is not mentioned in it. This branch of the law of Scotland, by preventing forgery, and insuring deliberate attention to important deeds, ought not to be relaxed. And the writing in question, so far as it contains a cautionary obligation or guarantee for a debt previously due, is not a document

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Lord Newton.—"I distinguish as to *res mercatoria* between furnishings made on a missive at the time, and a cautionary obligation for a debt already existing. In the one case, there may be a limitation of time, and in the other there is not. As to the notion of *rei interventus*, that plea is not well founded. My opinion of the law is clear, that cautionary is a *literarum obligatio*. It is true about seventy years ago, doubts were stirred about obligations, in the form of a missive, but these were groundless, and put an end to, by the judgments in Lawson's case and others. I was counsel in the case of Syme in 1772, and the result was, that in reference to a verbal engagement, prior to the missive, the party swore that he bound himself for a third only, and he was assoilzied, *quoad ultra*. If the case is not so reported, it ought to be so."

Lord Justice Clerk (Boyle).—"I have doubts as to the interlocutor. The letter cannot be separated, and we are not entitled to presume that any further furnishings would have been made, but for this letter. That is matter of opinion and conjecture, it is true; but that the thing is doubtful, is reason sufficient why we should not take on us to divide a transaction which, on the face of the writing, is one and indivisible. If there had been a simple cautionary obligation for the past furnishings, it would have required a *bond*. I go on the circumstances of the case, not on the general law of cautionary as laid down by Lord Newton."

Vide Hume's Collection of Session Papers.

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peculiar to merchants, like a bill of exchange, or a bill of lading. It, therefore, forms no exception to the general rules laid down in the several Scottish statutes, relative to the mode of authenticating deeds. 2d. Although a cautionary obligation may be entered into verbally, yet in this case, the appellant and respondent had no communication with each other. The action, therefore, rests upon the written instrument exclusively; and as the writing is defective, the action must prove unsuccessful. 3d. The writing is not fortified by *rei interventus*, or act done on the faith of it; that is to say, so far as the writing contains an obligation to pay money previously due, nothing that occurred afterwards tended to render that obligation stronger than it was at the original date of it.

Pleaded for the Respondent.— 1st. As to the price of the goods sold subsequently to the letter of guarantee, the respondent contended, (1st), that the appeal was incompetent, because, after the interlocutors of 6th December, and 18th December 1806, he did not submit these to the review of the Inner House, in so far as the amount of these goods was concerned, £391, 9s. 11d., but acquiesced in the same, and, therefore, the appeal is in violation of the statute, 48 Geo. III. c. 151, disallowing "appeals from interlocutors or decrees of the Lord "Ordinary, which have not been reviewed by the judges, sit- "ting in the division to which such Lord Ordinary belongs." As to one part of the account, namely, the goods delivered subsequent to the date of the guarantee, the cause was never reviewed by the judges of the second division, and, therefore, the appeal is incompetent. But (2d), there are no grounds, either in law or in fact, for questioning the judgment of the Lord Ordinary with regard to the future furnishings. The appellant on the contrary, in the pleadings on the other branch of the cause, never disputed that the letter was a writing *in rê mercatoriâ*, with regard to these furnishings; and, consequently, the objection of the want of legal solemnities, does not apply to it. 2d. In regard to the price of the goods sold before the date of the guarantee, it is quite clear, that the letter is a writing *in rê mercatoriâ*, with regard to these past furnishings; and there is no ground for a distinction between the one and the other in the terms of the letter, or in the principles of mercantile law, or in precedent, or in the practice of merchants. Though even the letter were a simple cautionary obligation, yet as the appellant's subscription is acknowledged, it is thereby rendered a probative and legal obligation, without the aid of the statutory solemnities.

After hearing counsel, it was

Ordered and adjuged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellant, *Robert Forsyth, J. P. Grant.*
For the Respondent, *Wm. Adam, W. G. Adam.*

HIS MAJESTY'S ADVOCATE FOR SCOTLAND on behalf of His Majesty, . . . *Appellant;*

The Honourable Mrs MARIA MACKENZIE of Cromarty, and EDWARD HAY MACKENZIE, Esq. of Newhall, her Husband, for his interest, ... *Respondents.*

(*Et e Contra*).

House of Lords, 27th July 1814.

PATRONAGES—CROWN'S RIGHT—PRESCRIPTION.—Certain patronages were claimed by the Crown as coming in place of the Bishop of Ross. The Crown had granted a right to these patronages to Sir William Keith of Delny, and through various singular successors deriving right from him, they at last came into the possession of the Bishop of Ross in 1636; and upon the suppression of Episcopacy, they again devolved on the Crown. The Barony of Delny, together with these patronages, had been acquired in 1656, from Sir Robert Innes, by the Cromarty family. The Earl of Cromarty was attainted in 1746, but afterwards his forfeited estates and patronages were, by 24 Geo. III. c. 57, restored to the heirs of the former owners. The question arose, whether these patronages belonged to the Crown, or to the Cromarty family. Held that fourteen of them belonged to the Cromarty family, but, in regard to the other five, no prescriptive right, and no possession having been established thereto, the Crown was preferred to them. Affirmed in the House of Lords in part, and *quoad ultra* remitted.

An action of declarator was raised by the appellant against the deceased Kenneth Mackenzie, Esq. of Cromarty, for the purpose of having it found and declared that the right of patronage of nineteen churches lying within the ancient diocese of Ross in the counties of Inverness, Ross, and Cromarty respectively, belonged to the Crown, and should be exercised by His Majesty and his royal successors; and that the defender should be found to have no right or title whatever to the patronages of the said churches. The patronages were of the churches of Fodderty, the united parishes of Kil-

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veying the patronages in question to him, along with the barony of Delny. Upon this disposition, Sir George took only a base infeftment, which was recorded; but, during the subsistence of Episcopacy, and when the Bishop of Ross must have been in possession of the whole of these patronages, Sir George Mackenzie, it is said, obtained two several charters from the Crown, the one dated 30th September 1678, and the other dated 9th June 1686, proceeding, as has been alleged, upon sign-manuals, and containing, at least the latter of them, a clause of *novodamus*. In these two charters, besides a great variety of lands and other subjects, there are included, "the advocation, donation, and right of patronage "of the kirks and parochins, as well parsonage as vicarage, "of Kilmuir, Fodderty, Logie, Kennettis, and Rosekeen, "lying in the sheriffdom of Ross and diocese of the same, "together with the right of patronage of the chaplainries of "Alness, erected upon the parsonage teinds of the parish "kirk of Alness, and the chaplainries of Nairtie, Newmone, "and Tarlogie, lying within said sheriffdom." On these charters, Sir George Mackenzie was infeft; although no possession of the patronages, it was stated, took place.

April 1698. July 15, 1698.

Sir George Mackenzie became Earl of Cromarty after the revolution, when the order of bishops was laid aside. He executed an entail upon which a charter of resignation was expede under the great seal of Scotland, of a great variety of lands, including the barony of Delny, with the right of patronage of the whole of the above mentioned churches, as well those comprehended in the Bishop of Ross' charter, as the three excepted from it. The whole of the above-mentioned patronages contained in the aforesaid Crown charter 1698, were again enumerated in another Crown charter of the estate of Cromarty under the great seal, expede

Nov. 29, 1722.

29th November 1722, in favour of the last Earl of Cromarty.

This earl was the female respondent's grandfather. He was attainted, and his estates forfeited to the Crown in 1746. They were vested in, and put under the management of, the Government trustees and commissioners, and while they thus remained, the rights of patronage which belonged to them were exercised by the Crown.

24 Geo. III. c. 57.

At last, by the Act 24 Geo. III. c. 57, His Majesty was pleased to express that the forfeited estates should be restored to the heirs of the former owners. They were, therefore, disannexed from the Crown, and, *inter alia*, the estates which had belonged to the female respondent's grandfather, were, by

parliamentary authority, restored to his son, the late Lord Macleod, subject to the debts with which they were charged.

The words of the Act are, "That it shall be lawful for His "Majesty to give, grant, and dispone to the Honourable John "Mackenzie, commonly called Lord Macleod, eldest son of "George, late Earl of Cromarty, and his heirs and assignees, "all and every the lands, lordships, baronies, tithes, parsonages, fishings and other like heritages, which became forfeited to His late Majesty, by the attainder of the said "George, late Earl of Cromarty, now deceased, and were "annexed to the Crown by the foresaid Act, in the 25th "year of the reign of His late Majesty." 24 Geo. III. c. 57.

Lord Macleod accordingly obtained a Crown charter and infeftment, in the broad and comprehensive terms above recited; and being thus vested in the full right of the estates which had belonged to his father, he executed a deed of entail, comprehending, *inter alia*, the various rights of patronage above mentioned, and for several years he continued to exercise these rights to the fullest extent, by granting presentations where the churches became vacant, and otherwise. On his death, Kenneth Mackenzie, his cousin-german, succeeded him, and made up titles as heir of entail under the deed already mentioned.

When the summons of declarator above alluded to was served, he raised also an action of declarator. Mr Kenneth Mackenzie having died, his wife was allowed to carry on the suit; and, after her death, her daughter, the respondent, and next heir of entail, carried on the action.

An interlocutor was pronounced which settled some general points in the cause, viz., 1st, That the title of the Bishop of Ross in 1636, was in general preferable to that of the defender's predecessor in 1656. 2dly, That, by the charter of *novodamus* in 1704, the respondent had an undoubted right to the patronages of Tain and Fodderty. 3dly, That her right was equally undoubted as to the patronages of Lochbroom, which had never belonged to any of the members of the chapter of the Bishop of Ross, but had been acquired by the defender's predecessors, by a quite separate channel. 4thly, That the defender had right to the patronages, which, it is admitted by His Majesty's advocate, had been excepted from the title of the Bishop of Ross in 1636. Still, however, the difficulty remained whether the exception included the two parishes of Kilmuir, Easter and Wester, and those of Logie, Easter and Wester, or only one of each of these Jan. 26, 1803.

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parishes. 5thly, It was agreed on all sides, that so far as the respondent could prove possession for forty years, or more, upon the titles produced for her, she would be entitled to a preference; but that, in computing these forty years, the period during which the estates had been possessed by the Crown, after the forfeiture, and before their restoration to Lord Macleod, was not to be reckoned on either side. In so far as the title of the Bishop of Ross was concerned, the

Feb. 15, 1803. respondent reclaimed, but the Court adhered.

But His Majesty's advocate contended, that, unless so far as the respondent could prove a special exception to the bishop's charter, with regard to particular patronages, the Crown was entitled to a preference, and that the point had been so determined by the Court, and the Lord Ordinary could not do otherwise. It was further contended that the respondent was obliged to establish a right to these class patronages by prescriptive titles and possession, and with regard to the others contained in the bishop's charter, it was contended that the respondent was precluded from entering any claim, either in virtue of special charters from the Crown subsequent to that in favour of the bishop, or by prescriptive possession; and that the reservation in the interlocutor of 26th January 1803, for enabling the respondent to prove a prescriptive right, related only to such patronages as might be claimed by the Crown *de jure communi*, and without any reference to the bishop's right; those contained in the bishop's charter being absolutely and without any qualification adjudged to the Crown.

The Lord Ordinary gave effect to these pleas by interlo-

July 6, 1803. cutor of this date.

After further discussion before him, and various inter-

Feb. 23, and Mar. 11, 1808. locutors, the cause was removed by reclaiming petition to the Court. The Court, of this date, pronounced this interlocutor:—"Find that the defender, Mrs Maria Mackenzie, "has right to the patronages of the parishes of Edderton, "Killernan, Killichrist, and Urray, and Kincardine; and "decern and declare accordingly in the action at her instance, "and assoilzie her from the counter-action at the instance "of His Majesty's advocate against her, in so far as regards "these four patronages; and decern."

His Majesty's advocate reclaimed and the Court pronounced

May 19, 1808. this interlocutor:—"The Lords having heard parties, &c., "and considered this petition, they refuse the desire thereof, "in so far as it complains of their interlocutor of the 23d day

" of February last, reclaimed against, and adhere to that inter-
" locutor; but find that His Majesty has right to the patronages
" of the parishes of Urquhart, Rosemarkie, Cullicuden, Suddy,
" Kirkmichael, and Arderseer, and decern and declare accord-
" ingly in the action, at the instance of His Majesty's ad-
" vocate; and assoilzie His Majesty's advocate from the
" counter-action, at the instance of Mrs Maria Mackenzie
" and her husband, in so far as regards these patronages, and
" decern."

The appellant brought his appeal to the House of Lords against the above interlocutors, in so far as unfavourable to him conceiving that in adjudging to the Crown, the right of patronage to the churches only of Cromarty, Urquhart, Rosemarkie, Callicuden, Suddy united to Kirkmichael and Arderseer, these interlocutors were erroneous.

And the respondent brought a cross appeal. She stated that, having succeeded in establishing her right to fourteen of the patronages in question, she was willing to have acquiesced; but the appeal of the appellant authorised her to lodge a cross appeal as to the remaining patronages which had been disallowed.

Pleaded for the Appellant.—The respondents have not made out a good right to these patronages, either upon the face of their titles, or upon the ground of prescription. The Court of Session has, however, found " That the defender has right " to the patronages in question, which are not contained in " the bishop's charter in 1636, being those of Kilmuir-Wester, " Kilmuir-Easter, Logie-Wester and Easter, and Rosekeen." In point of fact it will, however, be observed that three patronages not included in the Bishop of Ross' charter in 1636 are Kilmuir, Logie, and Rosekeen. It is natural at first sight to suppose that the ancient Kilmuir comprehended both Easter and Wester Kilmuir, which might have been separated by some modern disjunction. But this is not the case, these parishes never having had any connection, and being situated in totally different quarters of the county at a distance of more than twenty miles from each other.

Interlocutor, Nov. 20, 1806.

It appears that, before the Reformation, Kilmuir-Wester was a rectory or parish church, belonging to the Dean of Ross, whereas Kilmuir-Easter was merely a chaplainry; and as the Kilmuir granted to Sir William Keith in 1558 is expressly called a parish church, there can be no doubt that it was the former, and consequently the family of Cromarty, as deriving right from him, can have no claim whatever to the

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latter. In support of this state of the fact, the appellant took the liberty of referring to a passage in the answers for Mr Mackenzie of Allangrange to a petition for the solicitor of tithes in 1724, when the Crown had asserted a right to the patronage of Kilmuir-Wester, in the locality of that parish. This passage, in which the fact was distinctly stated in the appellant's petition to the Court of Session, showed that the Kilmuir gifted to Sir William Keith in 1588, and excepted from the bishop's charter in 1636 was Kilmuir-Wester; that there is no reason to suppose from any thing yet seen, that the chaplainry of Kilmuir-Easter belonged to the See of Ross at all; there can, therefore, be no doubt that the title of the Crown to the patronage of that parish ought to have been sustained.

In like manner, it is apprehended that Logie-Wester, which was annexed at a very remote period to the parish of Urquhart, is the parish excepted from the bishop's charter; as Urquhart is close contiguous to Kilmuir-Wester, and at the distance of many miles from Logie-Easter, in the north-east division of the county. This seems to be countenanced by the words of the charter 1588, which, after mentioning Kilmuir and Arderseer as the dean's benefice, and Killichrist and Kilmorack as the precentor's, thus specifies Urquhart and Logie as the treasurer's benefice: "Aliud beneficium in-"titulatum Theasuraria Rossenau quidem prius omnes et "singulæ decimæ garbales et rectoriæ ecclesiarum parocha-"lium de Urquhart et Logie jacens infra vice comitatum et "diocesin immediatè supra script." The Logie, therefore, that belonged to the precentor of Ross, which was gifted to Sir Wm. Keith in 1588, and excepted in the bishop's charter in 1636, must have been Logie-Wester, adjoining to Urquhart, and now annexed to it, and not Logie-Easter, which is situated in quite a different part of the county. It is submitted, therefore, that the respondents can have no right to the patronage of Logie-Easter, to which the exception in the bishop's charter, no more applies than it does to Kilmuir-Easter.

It is impossible, likewise, that the respondents can derive any right to these two patronages from the charters 1678 and 1686, which have been already noticed. As these two charters were not contained in the original grant to Sir William Keith, they were not excepted from the bishop's charter, 1636, and consequently never were in the person of Sir George Mackenzie or his authors, so as to be the subject of resigna-

tion by him in 1678; that resignation and the charter and the infeftment following on it, being, if good for any thing, applicable solely to the churches of Kilmuir-Wester and Logie-Wester, and the *novodamus* in the charter making mention of only one Kilmuir and one Logie. The respondents, therefore, so far from having shown a valid title to the patronages of Kilmuir-Easter and Logie-Easter, have not produced any document which can create even a presumption, that they ever belonged to the Cromarty family, or their authors.

The appellant, however, is free to admit that the claim of the respondent to Kilmuir-Wester, Logie-Wester, and Rosekeen, stands on a different footing; as these churches belonged to the chapter of Ross were contained in the grant of Sir William Keith, and were excepted from the bishop's charter. But, at the sametime, the right of the respondent, even with regard to them, was not free from great difficulty. No possession appears ever to have followed upon the grant of Sir William Keith as to any of the nineteen patronages, either previous to the contract, 1636, or subsequent to that date. That this was the case previous to the contract, 1636, is plain from a decree in absence obtained at the instance of Balmerino, the successors of Keiths. Subsequent to the contract, 1636, no evidence is produced of a single act of patronage having been exercised by Sir Robert Innes, or the family of Cromarty, his successors, in any of these three parishes. On the contrary, so far back as the records of the presbytery go, it appears either that the Crown exercised the right, or the minister was settled by a call of the presbytery, except that in Urquhart united with Logie, where Mr Forbes of Culloden seems twice to have presented.

Pleaded for the Respondents.—The Crown's general right to patronages, which do not appear to belong to some other owner, cannot here be warrantably urged, the declarator brought at the suit of His Majesty's advocate not being rested on that ground, but confined to the right of the Bishop of Ross, as established by the charter, 1636. But although it had been regularly brought forward and insisted on, it must have been considered to have been unauthorised and inadmissible. So it has been determined by the Court of Session, in reference to another right of patronage standing in the same situation. The female respondent's right, therefore, to the patronages conveyed to Sir William Keith, and not contained in the charter, in favour of the Bishop of Ross, appears to be altogether beyond the reach of challenge.

Urquhart and Officers of State, July 28, 1763, Fac. Coll., vol. i. p. 122, et Mor., p. 9199; et House of Lords, *ante*, vol. i., p. 586.

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2. The female respondent has a separate right to several of the patronages which are contained in the charter to the Bishop of Ross in 1636. As to those of Tain and Fodderty, this has been admitted by the appellant in consequence of the Crown charter in 1704, which contains a clause of *novodamus*. And her right to those of Kennetles and to the chaplainries of Alness, as well as those of Kilmuir, Logie, and Rosekeen, is equally clear in virtue of charters from the Crown, 1678 and 1686, and infeftments following thereon. And although the charter, 1686, cannot be found, this cannot here be deemed of any importance, for the evidence of the sasine taken upon it, establishes it beyond doubt.

3. The respondent has a further right to the patronages adjudged to her by prescriptive titles and possession. The Act, 1617, applies to the Crown as well as to the subject. These prescriptive titles are most clear and unquestionable. Even the conveyance, 1656, by Sir Robert Innes to the first Earl of Cromarty, would be alone sufficient, though at the time unwarranted on account of the charter in favour of the bishop, 1636; nothing but an objection on the ground of forgery, or an intrinsic nullity being available against a writing produced as a title of prescription. But besides this, it has been shown that there was a general conveyance in 1698, and another in 1722, containing all the patronages, which, with possession following thereon, would establish a most unquestionable right. And when it is further considered, what has not been so much as disputed by the appellant, that from the date of the first of these rights till about a century after, upon the attainder of the respondent's grandfather, the Crown never exercised, nor attempted to exercise, any act of possession, as coming in the place of the Bishop of Ross, while the respondent's ancestors did every thing, both before and after the unfortunate event, which the most undoubted proprietors could do, in pursuance of such a grant, it must be held that they had all the possession which is required by law for creating a prescriptive right in such a case.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,*

"There was an appeal and a cross appeal heard a considerable time ago, in a case, as it appeared to me, of so much importance

* From Mr Gurney's Short-hand Notes.

as to induce me to think it was right that, after the argument was over, your Lordships should afford me an opportunity of giving as much attention as I could to the circumstances of the case. The question I may represent to your Lordships very shortly, it being my purpose, with a very little alteration indeed, to propose to affirm the judgment of the Court of Session.

The question is of this nature. Upon the forfeiture of the Cromarty family, the property which belonged to that family, of course, came to the Crown; and among other property which had been forfeited, it was asserted on the one hand, and to a certain extent admitted on the other, that there were various advowsons of parish churches in Scotland which His Majesty was graciously pleased (having been enabled by Parliament to do so,) to restore to this family, about 1785, with the property which had become forfeited; and after the charter of restitution was made, a question arose as to a great variety of these patronages. The Cromarty family insisted that they were entitled to all the patronages, the names of which have occurred in the course of these causes; it being contended, on the other hand, that His Majesty was as clearly entitled; and in this case there have been, in all, I think, not less than twelve interlocutors, in which the opinion of the Court of Session has varied, more or less, in favour of the Crown and of the family. But I find in an interlocutor in the month of May 1808, it is declared that this family were entitled to all the patronages, except those specially named, which are the patronages known by the denominations of Cromarty (in reference to which the nature of the title seems to have been more particularly decerned to), and the parishes of Urquhart, Rosemarkie, Cullicudden, Suddy, Kirkmichael, and Arderseer.

"My Lords, there was an appeal brought by His Majesty's Advocate, insisting that the Crown was entitled to various patronages, the title to which had been declared by the ultimate interlocutors to belong to the Cromarty family. On the other hand, the family insisted that the Court of Session was bound, not only to affirm such part of the interlocutor as supported their interest, but to negative such part as declared any of these livings to belong to the Crown. Your Lordships will recollect that the hearing of this cause introduced a great deal of learning in respect of the titles of persons having the appointment of ecclesiastical persons.

"My Lords, upon giving repeatedly the best attention I have been enabled to give to this subject, my persuasion upon the matter is, that the ultimate decisions of the Court of Session are right decisions as between the parties; but your Lordships will permit me to observe, that it occurred in the course of the hearing, that when these great Scotch families were attainted, the acts of Parliament of that day had required that there should be made up an authentic record of all the possessions which came to the

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Crown by the forfeitures: That a wish was expressed on the part of the House, intimated first, I think, to be my own individual wish, that we should be able to ascertain, as far as inquiry and research would enable us to ascertain, what had been the property of this family, appearing by the record to which I am now referring, to be forfeited to the Crown. We have not received much useful information upon that head. But another circumstance occurred, which was this, that the Crown being enabled by Act of Parliament to re-grant to this family what had come to the Crown by forfeiture, the Crown executed a charter of restoration; and in the charter of restoration—it recited the Act of Parliament—it recited its purpose to grant what had come to it by forfeiture; and then, in execution of that purpose, it granted all the property, by various denominations, and, amongst others, all the patronages which had come to the Crown by their forfeiture; and it proceeds to state, as it expresses it in substance, without prejudice to the generality of these grants, the subjects following; and among the subjects following, with the exception, I think, of one, but including (which is rather surprising) Cromarty among the rest, it restores all those which are now adjudged to belong to the Crown as patronages which had come to the Crown by virtue of this forfeiture.

"My Lords, the charter of restoration appears to have been the subject of mention in the Court of Session; and, I have no doubt, it was also a subject of much attention in the Court of Session; but it happens that we are not able, by any address that we could make to the bar, and I have not been able, by any such conclusions as my leisure, if I had any since the cause was heard, have enabled me to make, to get over a difficulty, which, unquestionably, would exist with respect to the law of England, though, perhaps, it is a difficulty which may not at all exist as to the law of Scotland. In this charter of restoration you have the fact recited that these patronages, with an exception, came to the Crown by forfeiture;—you have these patronages, with the same exception, restored by the Crown (as having taken them by the forfeiture) to the Cromarty family; and the charter stands, at this moment, an effectual and valid instrument, open, undoubtedly, if we were considering the matter under the law of England, to all the objections that would be made to the Crown's charter, that is, if the Crown has been deceived; if the Crown has granted, as coming by forfeiture, that which did not come by forfeiture, there is no doubt that, by a proceeding for that purpose, the charter might be annulled, or reformed, under our law to the extent that His Majesty has made it under that misunderstanding of the facts.—So I take it also, by the law of Scotland, speaking, however, with great hesitation upon that subject. But, from the knowledge one has gained here of the necessity of reducing deeds which have no effect till reduced, I am

not aware whether there is not a similitude, with respect to grants of the Crown, between English grants and Scotch grants, till, by some process, those grants have been, in both countries, reduced; and, without pronouncing that it is necessary to reduce the Crown's charter, still, by any communication made to us, we have not seen precisely the answer that can be given to the fact that there does not exist, at this moment, of the Crown's charter restoring those patronages, with the exception I have alluded to, as those which had come to the Crown by the forfeiture of the Cromarty family; and if they had come to the Crown by the forfeiture of the Cromarty family, then, I apprehend, it is extremely clear that the Crown cannot have a title adjudged in its favour. Whether it is or not necessary to reduce the charter to which I have been thus especially alluding, I will not venture to pronounce; but I think it would be prudent for your Lordships so to word your affirmance of this judgment, as to give the parties an opportunity, if it be worth their while, of calling the attention of the Court to it, and enabling the Court to determine, whether it is a subject worthy of their attention or not.

"The judgment, therefore, that in this case I shall take the liberty of proposing to your Lordships will be, after reciting the several orders, and so on, to state that the said original appeal—that is, the Lord Advocate's appeal—be, and the same is hereby, dismissed this House; and that the interlocutors complained of, in as far as the same, or any of them, find Mrs Maria Mackenzie and Edward Mackenzie entitled to certain of the patronages mentioned in such interlocutors be, and the same are hereby, affirmed: And further, to order that the interlocutors complained of in the cross-appeal, in as far as such interlocutors find the Lord Advocate, on behalf of His Majesty, entitled to certain of the patronages mentioned in such interlocutors, be remitted back to the Court of Session to reconsider the same, in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall, within six months of the date of this judgment, apply to the said Court, by petition, to reconsider such interlocutors; the said Court, in so reconsidering such interlocutors, having regard to the effect of a certain charter in favour of the Honourable John Mackenzie, commonly called Lord Macleod, of date the 14th February 1785, until such charter be reduced and set aside, and to do in the said cause, or in any action of reduction which may be brought for the purpose of setting aside the charter, if such action shall be necessary, what to the said Court shall appear meet and fit to be done: And in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie should not apply to the said Court within six months, as above directed, the said interlocutors complained of in the said cross appeal, be, and that the same are hereby affirmed; and that the cross appeal in such case be, and it is hereby dismissed this House.

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That will give an opportunity of calling the attention of the Court, if they think proper, to it; and it will give the Court an opportunity of giving such attention as the Court, in its wisdom, shall think fit to give to this cause; and if they think proper to pass from it, they will have an opportunity of passing from it. They will have an opportunity of judging for themselves, whether interlocutors which, perhaps, are not otherwise objectionable, it is worth their while to object to, for the purpose of compelling the reduction of the effect of so much of this charter as relates to these patronages, in order to make way for the reiteration, perhaps, of the same interlocutors. That, however, is matter for their consideration; and if your Lordships will give me leave, I will now move, that this minute I have read be the judgment of this House."

It was therefore ordered and adjudged, that the said original appeal be, and the same is, hereby, dismissed this House; and that the said interlocutors therein complained of, in as far as the same, or any of them, find the said Mrs Maria Mackenzie and Edward Hay Mackenzie entitled to certain of the patronages mentioned in such interlocutors, be, and the same are hereby affirmed. And it is further ordered, That the said interlocutors complained of in the said cross-appeal, in as far as such interlocutors find the said Lord Advocate, on behalf of His Majesty, entitled to certain of the patronages mentioned in such interlocutors, be remitted back to the Court of Session to reconsider the same, in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall, within six months of the date of this judgment, apply to the said Court by petition, so as to reconsider such interlocutors; the said Court, in so reconsidering such interlocutors, having regard to the effect of a certain charter in favour of the Honourable John Mackenzie, commonly called Lord M'Leod, of date the 14th February 1785, until such charter be reduced and set aside; and to do in the said cause, or in any action of reduction which may be brought for the purpose of setting aside the said charter, if such action shall be necessary, what to the said Court shall appear meet and fit to be done; and in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall not apply to the said Court within six months, as above directed, the said interlocutors complained of in the said cross appeal be, and the same are hereby affirmed: And it is further ordered, That the said cross appeal be, and is, hereby, dismissed this House.

For the Appellant, *Ar. Colquhoun, David Boyle.*
For the Respondents, *Wm. Alexander, Robt. Craigie, Wm. Murray.*

NOTE.—Under the foregoing remit, the following opinions were given by the Court:—

9th March 1816.

LORD JUSTICE-CLERK (BOYLE).—"Whatever objections may have been formerly applicable to the original transferences of the patronages in question by the conveyances of Sir Robert Innes, in 1656, to Sir George Mackenzie, the charters, 1678, 1686, 1698, of the whole barony of Delny, and particularly the Crown charter 1722, including expressly the patronages now in question, followed as they were by the new grant under the sign-manual in the charter of restoration 1785, cannot be viewed but as constituting a sufficient title in favour of the defender, if not cut off by a contrary possession on the part of the Crown. And, considering the exceptions in the Act 1606, c. 2, and in the Act 1617, there is much weight due to the observations in the additional memorial for Mrs Mackenzie, that they amount in reality to a ratification of the early grants.

"As to possession, then, though the Acts are not so long or so numerous as could be wished, yet, considering the circumstances of the times, I think those noticed by the defender, as to vacant stipends as well giving in localities, in the case of Rosemarkie; presenting, in that of Callicudden, the statement to the General Assembly in 1749, and the letter of the incumbent as to Suddy, in the absence of all attempts at possession on the part of the Crown, except the sign-manual in 1770 as to Rosemarkie, during the forfeiture, are sufficient.

"As to any specialty with regard to these parishes, which could place them in a different situation from others awarded to Mrs Mackenzie, I never could see it; and I knew something of this cause before it went to the House of Lords.

"As to the claim for reducing the charter 1785, I cannot see any legal grounds for it. In the absence of contrary evidence, *omnia presumuntur rite et solemniter acta.* We are bound to hold the Crown officers of the day were fully satisfied by the former titles, surveys, or other competent evidence, that the patronages contained in it ought to be restored; and, therefore, having regard to that charter, as directed by the remit to the House of Lords, I hold it an additional reason for sustaining the right of Mrs Mackenzie."

LORD ROBERTSON.—"Lord Balmerino got a charter in 1606, from the Crown, and is of great importance to the case, as showing the grant was protected by the exception in the Act 1606, con-

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firmed by decree in 1631. He conveyed to Sir Robert Innes, who also got a charter and afterwards an agreement with the Bishop of Ross, who got back all the patronages, except Logie and two others; and the bishop got a charter confirming his right, and I think it was good at that time. Afterwards, Lord Cromarty got a right to which the bishop's was, however, preferable; yet Lord Cromarty's title will be good if followed by possession. I see none prior to 1690 on either side, and after it till 1712, no room for exercising patronage. When the estate was forfeited, the survey would necessarily comprehend the patronages, and the Crown would get the estate *tantum et tale* as the family held it. When it was restored in 1786, the charter would also comprehend them, as the charter 1785 flows directly from the Crown. The whole rights of parties will just depend upon possession. If the Cromarty family have it during prescription, it will avail; and if none, its title cannot prevail against the Crown; and I see no sufficient evidence of such possession in that family. In the processes of locality, I see none given in. I think the right of the Crown is preferable, both in right of bishops, and *jure coronæ*."

LORD BANNATYNE.—"I think the question is attended with some difficulty. The effect of the charter, 1785, might be removed by a reduction, but I don't hold that necessary. It gave back only what belonged to the family. I have some difficulty as to the (prescriptive?) right, which depends altogether upon possession; and *jus coronæ* is out of the question, as these patronages belonged to the Bishop of Ross. I think it *jus tertii* to the Crown to argue there was a better right in another. He can't prevail, without showing the bishop's right is not in the Cromarty family. It was transferred in 1688, and subsequent charters. I see no right to exercise possession in any party, either Cromarty or others, in right of the bishop, as Sir Robert Innes' right never returned to the Crown. There was no patronage after the Revolution, yet the family of Cromarty remained in all other respects as patrons, and I see no distinction between the three in question, and those already finally adjudged to the Cromarty family."

LORD GLENLEE.—"I agree with Lord Robertson, except as to the necessity of the reduction of the charter, 1785. But it would be directly contrary to a judgment of Court, affirming that of Lord Craigie. This charter was to restore merely what was in the forfeited family; and if more, it followed *a non habente potestatem*. No occasion for reduction in competition with another right during the years of prescription. By charter of the bishop from the Crown, after the transaction with Sir Robert Innes, the latter was completely denuded. This grant was of no use unless followed by prescription. There was no exception of all former dispositions of the patronages. Now the Crown is in absolute

right of the Bishop of Ross. The defender's right requires possession, but the Crown's right does not. If the party has a right from a proper author, prescription is not necessary, but only to show that another party has not had it. No *terminis habilis* for prescription before the rebellion. There should be other acts. Is there forty years' possession? Nothing like it. I think the remit shows that the House of Lords had no doubt."

Lord Pitmilly.—"I am quite clear, 1*st*, That it is plain the act vesting in the Crown took only what was in the family; and the charter, 1789, only restored what was forfeited, neither better nor worse. The effect of the charter, 1785, may be considered in two views. 1*st*, Was there a mistake in it? If so, it might be reduced accordingly, as passing *a non habente potestatem*. I think the reduction is not necessary, as coming in competition with another right, and no prescription run on it. There are authorities for this in the older decisions. One in Durie. The charter, 1785, conveyed nothing more than was in the Cromarty family before the forfeiture. The Bishop of Ross, in 1636, had been vested in these patronages. In 1656, Innes erroneously granted conveyance to Mackenzie. These patronages were included in the Crown charter erroneously; and, therefore, it is absolutely necessary that they should be included in the survey, and restored by the Act 1785, just as they stood in the persons of the family. But they stood erroneously in that situation, and this is a separate reason for no reduction. We must go back to the older titles. The charter, 1636, shows the right of the Crown, and 1656 that of the Cromarty family. The Crown came in place of the Bishop of Ross. The Crown's right was thereby complete, and prescription is not necessary to validate it. But the right of the Cromarty family flowed under the express reservation of all former rights by charter, 1636. The Cromarty title is incomplete and erroneous. Has it been made good or valid? It may be by prescription; but I think none sufficient has followed on this erroneous title, and, therefore, the right of the Crown is preferable."

The Court, therefore, preferred the right of the Crown to the patronages of the parishes in question, and Mrs Mackenzie persisted in the suit no longer.

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AGNEW v. STEWART, &c.

(Sheuchan Case.)

JOHN VANS AGNEW, Esq. of Sheuchan, - *Appellant.*

PATRICK STEWART, Esq., of Cairnsmoor, the surviving Trustee for the Creditors of John Vans, Esq., of Barnbarrow; and EBENEZER DREW, of Anchenhay, as representing the deceased Alexander Drew, Merchant in Newton-Stewart, the other Trustee of the said Creditors, - - } *Respondents.*

House of Lords, 29th July 1814.

(*First Appeal.*)

ENTAIL—CONTRACTION OF DEBT.—Question, Whether an entail was good against creditors?

The appellant's grandfather, John Vans of Barnbarrow, was married to Margaret Agnew, the only child of Robert Agnew, Esq. of Sheuchan.

Sometime after the marriage, Robert Agnew and his son-in-law, John Vans, entered into an agreement, for the purpose of securing the estates of both families by a strict entail.

They, thereupon, executed a mutual entail of the Barnbarrow estate on the one side, and of the Sheuchan estate on the other. This deed was essentially, in its form, of an onerous character, and the dispositive clause bore the words—"Gives, "grants, *sells*, and alienates."

It turned out, on John Vans' death, that he was considerably in debt. It appeared, also, that he had been in debt at the time this transaction was entered into. His son, who succeeded, contracted more debt; and being anxious, in order to pay these, to break through the entail, so as to make these estates affectable by his father's debts, the creditors were induced to assign their claims to Messrs Stewart and Drew, as trustees for the creditors, who brought the present action of declarator and reduction to set aside the entail.

In this action two questions arose—1. Whether the proprietor of a fee-simple estate can make an effectual entail, and place himself under all the fetters thereof, so as to exclude creditors affecting the estate by diligence or otherwise? 2. Whether the entail contained an effectual prohibition against the contraction of debt?

In the Court of Session, it was held generally that the entail was not effectual against the creditors of Mr Vans, as to his estate of Barnbarrow.

An appeal having been taken to the House of Lords, the case was remitted for re-consideration. A full report of this case, together with the Judges' opinions, as also of the procedure which took place in the Court of Session after the remit, will be found in Mr Shaw's Report of the Second Appeal to the House of Lords, vol. i., p. 320, which see.

For the Appellant, *John Clerk, John Greenshields, Alexander Maconochie, J. A. Murray.*

For the Respondents, *Wm. Adam, Sir Samuel Romilly.*

(Sheuchan Case.)

JOHN VANS AGNEW of Sheuchan, - - *Appellant.*

Mrs FRANCES DUNLOP, otherwise AGNEW, Widow and universal Disponee and Executrix of Robert Agnew, Esq., last of Sheuchan, - - - - - - *Respondent.*

House of Lords, 29th July 1814.

(*Second Appeal.*)

It has been seen by the previous appeal, that the creditors had been successful before the Court of Session in obtaining a judgment, finding that the entailed estate of Barnbarrow was liable for John Vans' debts.

It was also mentioned that his son, Robert Vans Agnew, had also contracted considerable debts; and he in his turn raised an action of reduction against the heirs of entail, on the grounds, *inter alia*—1st, That the entail did not protect the estates against the contraction of debts. 2d, That he was entitled to set aside the contract of mutual entail because the counterpart of it had not been implemented on the part of John Vans, one of the contracting parties, but the same had been defeated by his contracting debts. 3d, That he ought to be allowed to relieve and disengage from the said entail as much of the estate of Sheuchan as would be equal in value to the extent of the debts contracted by John Vans. 4th, To sell and dispose of so much of the said lands and estate of Barnbarrow, as shall be sufficient to discharge these debts; and for their Lordships to interpone their authority to such sale, upon proof of the rental and value of the estate.

A remit was made to an accountant, as to the amount of the debts and the rental of the estate; but the Court ultimately pronounced this interlocutor:—"But, in regard there

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AGNEW v. DUNLOP. March 11, 1785.

" is no clause or provision in the entail by which the heir of " entail is empowered to sell the whole or any part of the said " estate of Barnbarrow for payment of debt, and in regard the " Court has no jurisdiction to authorise any such sale, assoilzie " the defenders,—leaving to the pursuer and the other parties " concerned to take such steps for their relief in the premises " as they shall be advised."

Against the interlocutors pronounced in this cause, with the exception of part of the last interlocutor, which is above quoted, the present appeal was brought.

After hearing counsel,

It was ordered, That the cause be remitted back to the Court of Session to review the interlocutors complained of generally, allowing the appellant to call all necessary parties before them, and to do therein as to them shall seem just.

For the Appellant, *John Clerk, J. Greenshields, Alexander Maconochie, J. A. Murray.*

For the Respondent, *Sir Samuel Romilly, Geo. Cranstoun.*

(Sheuchan Case.)

JOHN VANS AGNEW, Esq. of Sheuchan, *Appellant.*

Mrs FRANCES DUNLOP, otherwise AGNEW, Widow, and universal Disponee and Executrix of Robert Vans Agnew, Esq., last of Sheuchan, as representing her said Husband; the Right Honourable JOHN, EARL of STAIR, JOHN MAITLAND, Esq. of Freugh, as representing the deceased Captain the Honourable PATRICK MAITLAND of Freugh; Sir DAVID HUNTER BLAIR, Bart., and JAMES HUNTER BLAIR, Esq., both or one of them representing the deceased Sir John Hunter Blair of Dunskey, Bart.; RAMSAY HANNAY, Esq. of Kirkdale, ALEXANDER M'LEAN, Esq. of Mark, and CHARLES STEWART, W.S., as Trustees of William Hannay of Bargally; and JOHNSTON HANNAY of Torrs, Esq., and DAVID BALFOUR, Esq., W.S., - } *Respondents.*

(Third Appeal.)

House of Lords, 29th July 1814.

APPEAL.—Circumstances in which an appeal was dismissed as incompetent.

Having been disappointed in obtaining authority from the Court of Session to sell the estate of Barnbarrow, to pay John Vans' debts, as is shown by the preceding appeal, Robert Agnew, the son, went to Parliament, and obtained an Act authorizing the sale of such parts of Barnbarrow and Sheuchan estates as might be necessary to pay off these debts.

He obtained this Act, which gave him power to sell such detached parts of Barnbarrow for the purpose of paying off these debts, and if that was insufficient, also to sell such disconnected parts of the estate of Sheuchan as should be necessary for the payment of said debts.

Under this Act, certain lots were fixed on, and sold by judicial sale to the respondents.

The appellant did not raise a reduction of these proceedings in the Court below; but it seems having certain objections to the regularity of the proceedings in the sale, such as that these proceedings were in absence while he was a minor, and that no curator *ad litem* had been appointed to him, and that the whole proceedings were collusive, and that the Act of Parliament obtained for the sales of the estates was obtained upon untrue statements in regard to the estate, and without any just grounds for the sale, he brought the present appeal against the whole interlocutors in the cause, the last being dated 30th June 1808.

In hearing the cause in the House of Lords, it was objected to by the respondents, 1st, That the appeal was incompetent as not having been brought in due time, under the standing orders of the House, 24th March 1725; 2d, That the appellant had not cited as respondents to his appeal the creditors of his late grandfather, who were necessary parties thereto; 3d, That the present respondents were not parties to the action in the Court below, and it is not competent to bring the rights of purchasers at judicial sales under challenge in the way of appeal,—that can be done only by proper action of reduction, brought in a competent Court, and cannot be brought in question in the first instance by way of an appeal.

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LORD CHANCELLOR ELDON (as to these three appeals) said*—

"My Lords,

"There are three appeals in the matter of Agnew *v.* Stewart, Agnew *v.* Agnew, and Agnew *v.* Agnew, the Earl of Stair, and Others. These appeals affect a great variety of proceedings in the Court of Session. The latter case respects the execution of a decree following on an Act of Parliament. My Lords, with respect to that, it appears to me, upon consideration of the case, that it is quite clear the appeal to this House is quite incompetent. Our jurisdiction here is to decide on questions of law on which judgment has been originally given in the Court below; it is perfectly impossible to say that there is a case here on which a judgment has been given in the Court below; and if, when the appeal was first presented, the respondents had applied by petition, stating that it was a case in which an appeal was incompetent, and praying the appeal might be dismissed, I think, the House would on such a petition being brought before it, have had no difficulty in informing them that they were not bound to answer such an appeal, and would have dismissed it. The respondents, however, have taken another course, and have put the case in the state in which it now is, which makes it reasonable there should be no costs; but it appears to me that the proper way of disposing of that will be—(declaring that it is not competent, in the circumstances of this case, to affect the purchaser by the proceeding of the appeal)—to dismiss this appeal, reserving to the appellant such relief (if any); not meaning to say that he has any, but reserving to him such relief, if he has any, in any other mode of proceeding."

Ordered accordingly.

LORD CHANCELLOR.

"My Lords,

"With respect to the two other cases, they involve very material, and to me very nice, points of Scotch law, which, in consequence of this gentleman being very long abroad, have been brought before your Lordships at a very late period. These points of Scotch law occurring so long ago as the year 1784, nobody has been able to give us the least information at the bar of the reasons upon which the Court of Session proceeded; and therefore I am of opinion that it might be right in these cases to remit them to the Court of Session, to review the interlocutors complained of generally, allowing the appellant to call all necessary parties before them, and to do therein as to them shall seem just. I feel that it would be impossible to decide these cases with any certainty that we were possessed of the merits or the principles upon which they

* From Mr Gurney's Short-hand Notes.

ought to be decided; and your Lordships know, with respect to entails and the mode of effecting them, there have been very important decisions within the last few years, reference to which must be had in the determination of this case. I therefore feel, that, as it respects all parties, it will be exceedingly desirable that these interlocutors should be remitted to the Court of Session."

Ordered accordingly.

Whereupon the Lord Chancellor pronounced the following judgment in the last of these appeals:—

It is declared, That it is not competent in the circumstances of this case to affect the purchasers by the proceeding of appeal; it is therefore ordered that the said appeal be, and the same is hereby dismissed this House, reserving to the appellant such relief (if any) as he may be entitled to in any other mode of proceeding.

For Appellant, *John Clerk, John Greenshields, Alexander Maconochie, J. Murray.*

For Respondents, *Sir Saml. Romilly, Math. Ross.*

NOTE.— *Vide* Shaw's Appeal Cases for what was done under this remit, vol. i., p. 333.

(Scarr Case.)

[Fac. Coll., Vol. xiv. p. 209; et Napier on Prescription.]

Mrs JEAN WELSH MAXWELL, of Steelston, and Lieut.-Colonel WILLIAM NEWALL, her Husband, - - - - - *Appellants.*

ALEXANDER WELSH, Esq., of Scarr, - - *Respondent.*

House of Lords, 29th July 1814.

ENTAIL—NEGATIVE PRESCRIPTION—POSSESSION ON TWO TITLES—NON VALENTES AGERE.—An entail was made of the estate of Scarr, which, after being recorded, remained personal, without any title being made up under it. The institute, who was also the entailer's heir of line, possessed on apparency for twenty years. The entailer having left some debt, the son of William Welsh, a substitute under the entail, attempted to carry off the estate as a fee simple estate, by obtaining an assignation to these debts, and adjudging upon these, charter was obtained upon this adjudication,

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but no infeftment was taken until 1793. He continued to possess until his death without making up any other title, but left a disposition of his estate in favour of the appellant. In a reduction of that right, brought by the respondent, the next substitute; held that the entail had not incurred the negative prescription, and that the possession of William Welsh and his son John, was to be ascribed to the entail, and not to their unlimited title as heirs of line.

In 1748 Alexander Welsh died, possessed of the lands of Scarr, of which he was unlimited proprietor, but leaving an entail executed many years before his death.

At this time the rental was only £35, 8s. 8d. per annum, and it was burdened with a liferent locality of £15, 8s. 8d., provided for his widow, who survived him. He left, besides, heritable debts to the amount of £333, 6s. 8d., and £280, 1s. 8d. of moveable debts. His nephew, William Welsh, the institute in the entail, succeeded. He was also heir of line, and chose to possess on apparency, without making up his title in either capacity. Sometime thereafter an adjudication was led, including therein all these debts, and decree obtained in name of David Newall, in trust for behoof of John Welsh Maxwell, the son and heir of William Welsh. It was alleged that this was an attempt to carry off the estate as a fee simple estate.

John Welsh Maxwell having thus acquired adjudication and grounds of debt, he afterwards expede a charter of adjudication of the lands of Steelston, Scarr, and others, and was
Dec. 10, 1793. infeft of this date, but decree of expiry of the legal of the adjudication did not appear to have been obtained.

Afterwards he executed a disposition by which he gave, granted, and disponed "to, and in favour of the said Jane "Maxwell (the appellant), and Anne Welsh (her sister), "equally between them, and their heirs, and successors, and "disponees, all lands and heritages belonging, or which shall "belong to me at the time of my death, with the whole writs "and evidents thereof, conceived in favour of me, or my pre-"decessors and authors."

Anne Welsh having died, the female appellant was served heir to her, and entered into the possession of the estate.

After the female appellant had been in the undisturbed possession for upwards of sixty years, it was found that Alexander Welsh, who died in 1748, had, before his death, made an
Sept. 16, 1742. entail of the estate of Scarr, and which was duly recorded in the same year, but no infeftment followed thereon, the right

under the entail remaining personal. By this deed William Welsh was taken bound, as a condition of his succeeding, to pay off all his debts, &c. William Welsh and his son, John Welsh Maxwell, were both of them the nearest heirs of tailzie nominated in the entail. They were also the deceased's heirs of line, and they were also the acquirers of the separate title to the estate by the adjudication above recited. After them the next substitute was the respondent's father, Mr Hamilton, married to the entailer's sister, and then, after him, the appellant.

An action of reduction was brought by the heir of entail to set aside the appellant's right, the value of the estate and of the land having risen greatly in the interval.

The defences set up by the appellant were, 1st, That the entail upon which the pursuer (respondent) founded his claim, was cut off and excluded by the negative prescription; 2d, Even were this not the case, she was entitled to keep possession of the subjects until she received payment of the debts contained in the adjudication.

The answer made by the respondent was, 1st, That he and his father were in the predicament of *non valentes agere cum effectu;* and that in three respects, 1st, Neither he nor his father had any right, during the lives of William Welsh, and his son, John Welsh Maxwell, to compel either of them to complete the investiture pointed out by the entail, by expeding a charter in terms thereof, and taking infeftment upon it; 2d, Neither he nor his author had any interest to pursue such an action, till the death of John Welsh Maxwell, in the year 1801, because William Welsh, and his son, John Welsh Maxwell, were not only heirs of entail in the tailzie, but the nearest heirs of entail, as well as heirs of line, and therefore the respondent could not have demanded possession, as long as either of them lived. And lastly, he maintained that their possession was to be imputed, not to the apparency under the old investiture, but to the personal right contained in the disposition and tailzie.

But the chief reply of the respondent was, that the prescriptive possession pleaded, was a possession of persons who were the nearest heirs of tailzie under the entail, and therefore that the possession of William Welsh, and his son, John Welsh Maxwell, must be ascribed to the entail, and not to the unlimited title subsequently acquired by them.

This interlocutor was finally pronounced, "The Lords alter "the interlocutor of the Lord Ordinary reclaimed against, and Jan. 23, 1807.

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" in the process of reduction, repel the defences of the negative prescription and all other defences pleaded for Mrs Jane " Maxwell and husband, defenders; sustain the reasons of " reduction, and reduce, decern and declare in the terms of the " conclusions of the reduction libelled; also in the process of " multiplepoinding prefer Alexander Welsh the pursuer, upon " the interest produced for him to the sum in the hands of " the raisers of the multiplepoinding, and remit to the Lord " Ordinary to proceed accordingly."

June 22, 1808. On reclaiming petition, the Court pronounced this interlocutor,—" Adhere to their interlocutor reclaimed against, " in so far as it repels the defence of the negative prescription, " but recall the same, *quoad ultra*, and remit to the Lord " Ordinary to hear parties upon the other defences pleaded " for Mrs Jane Maxwell and husband, and to do as he shall " see cause." *

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* Opinions of the Judges :—

LORD HERMAND—" I am for altering. The party did all he could to free the tailzie. The limitations confessedly are worked off. I cannot enter into the notion of the destination being entire. No such thing found in the Durham case; the principle there was, that both destinations were unlimited. There is no need of a contrary act by the possessor. The substitutes were *valentes agere*. They had an interest and a title to preserve their right. It is the negative prescription that applies here; there is no need of a title, as recognised in the Inverleith case."

LORD NEWTON.—" I am for adhering. This man, by possession, could not work off the destination, though he might the fetters. The entail was the *lex feudi* till a new settlement was made. But the main ground of our judgment was this, that the tailzie imposed no special obligation to possess on that title. If it had been challenged, his answer would have been good, that he had not made up any other title. True, if he had followed up the advice he got, and got charter of adjudication and sasine, that would have done; but he did not. Further, he cannot plead the positive prescription. See the case of Porterfield."

Dec. 6, 1771, Mor. p. 10698.

LORD JUSTICE CLERK (HOPE).—" The petitioner's plea fails in point of fact. There is no *evidence* or *indication* that he possessed as heir of line. This is not to be presumed, and the thing is not shown."

LORD MEADOWBANK.—" I see no ground on which to dispute that he possessed on both titles. He did nothing to prefer the one title to the other. By possessing as he did, he became personally liable to fulfil the tailzie. If so, there was no *valentes agere cum*

From these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Any claim which the re-

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effectu, for inhibition would have been competent at the instance of the substitutes to secure the obligation. I am thus for adhering on this ground, that he was possessing on both titles, and had done nothing to attribute his possession to the unlimited tail title."

LORD ARMADALE.—"Can there be a negative prescription without a positive? I think there may. An *obligation* to make an entail may prescribe. It has been found expressly that both applied. I think that the negative applies in this instance, which is partly (and such often occurs) a deed of tailzie, and partly an obligation. 2d. Has there been possession here on the tailzie? It is said that a party is held to possess on *all* his titles. True; in order to defend his right, he is allowed to plead all his titles. But it is quite otherwise where the titles are of different degrees of benefit. The same favour of possession entitles him to ascribe his possession to the most advantageous title, where the question comes to be about the condition of his right, provided he has done nothing repugnant to it. Now, here there is no use made of the tailzie, by service or otherwise, to fix him down to the tailzie, and law will not, by prescription, hold the contrary. That he is contravening his predecessor's will is no reason why he should be held to do so. As to *non valens agere*, for want of a special clause obliging to possess on that title, such clauses are new things, and not *necessary*, for the obligation attaches of itself, and the heirs of law succeeding without such clause, could compel him to make up a title on it. It would not have been a good answer that he was possessing on a personal deed. The substitutes had a right to insist for investiture. I cannot go into the notion that the deed subsists as to succession and not as to limitations. My notion is, that he possesses as heir, and not on the deed at all."

LORD CRAIG.—"I agree with Lord Armadale. The entail is worked off by the negative prescription simply. In one sense he possesses on all his titles; but, in another, on the most beneficial only."

LORD BANNATYNE.—"There are situations where the positive and negative prescription concur. But that is not universally true nor applicable here. If I have a right to my estate, all matters of obligation are worked off by the negative only. Such is the obligation to effectuate this tailzie. Substitutes were *valentes agere*. For they might have compelled him to invest on the tailzie. There is no need of an express clause to that purpose. Trust *de jure* from the nature of the thing."

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spondents pretend to have under the entail 1742, is completely cut off by the negative prescription introduced by the statute 1469, c. 28, which enacts, "That any party having interest

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LORD GLENLEE.—"Where both titles remain *in nudis finibus*, and nothing done in pursuance, or towards implement of either, I see no grounds on which to ascribe the possession to one title more than to another. I must ascribe it to both, because it is a case of indefinite possession."

LORD MEADOWBANK.—"I consider, further, that the only right and lawful title was the tailzie. Are we, then, to ascribe possession to an improper and unlawful title?"

LORD PRESIDENT (CAMPBELL).—"I observe this person, William Welsh, was institute and disponee under the deed of tailzie. If he meant to have possessed otherwise, he must have been served and been infeft to enable him to provide for his widow and children. He took no step of that sort. At the end of twenty years he advises with counsel how to get rid of it. If he had followed that advice, and obtained charter and sasine, he might have evicted the estate. The question is, Is the tailzie lost by the negative prescription? Such a thing may be; especially in a case of obligation to make a tailzie, but here, where the tailzie is made, and the heir of tailzie succeeds, it is difficult to say that the negative prescription will extinguish it. If persons not called by the tailzie had succeeded and possessed—if things had been done which the tailzie had prohibited, that might have done. But none of these things occur here. There is nothing done at all that is repugnant to the tailzie. The substitutes were not called on to do anything for their interests, as nothing was done against it. I do not, at sametime, rest much on the want of a *special clause*, ordering him to possess on that title. The thing is implied; but as no particular time for making up titles is implied by the law, the substitutes could not have prevailed in any action for that purpose. If such action had been brought, it would have served only to interrupt the negative prescription; and it is settled that a person need not pursue for the purpose of interrupting only. That was the principle of the judgment in Dalhousie's case. On that principle I go here. An action of substitution would have been nugatory. William would have answered well, that he was, at least, possessing on *all* his titles.

Mar. 1, 1782, Mor. p 10963.

"There is a great deal of argument here as to the separation of the destination and the limitations. Such cases do happen, as where an heir of tailzie omits limiting clauses. But there is no need of going into that."

MR BLAIR.—"In truth it was beneficial to William to possess on the tailzie. The estate was over-burdened with debt. He

" in the obligation, shall follow the said obligation, within the " space of forty years, and take document thereupon; and gif " he does not, it shall be prescribed, and be of nane avail, " the said forty years being runnin, and unpursued by the " party." So, in like manner, the statute 1474, c. 54. And the statute 1617, c. 12, provides that all actions competent of the law upon all deeds whatsoever " shall be pursued within " the space of forty years after the date of the same." The action, however, upon the part of the respondent, was not brought until sixty-four years after the date of the deed of tailzie in 1742, and, therefore, no action is now competent, and the entail prescribed.

2. The possession of William Welsh and John Welsh Maxwell, his son, will, according to law, be imputed to their title as heirs apparent of line, and will not be imputed to their title as institute or substitute under the entail; and the respondent cannot truly say that his father, while he lived, or he himself, since his father's death, was, during any period of that possession, *non valens agere cum effectu.* For they, in their order, had a right to compel the heirs successively in possession to make up titles, and complete the investiture prescribed by the entail.

3. It is not necessary, in order to entitle any party to plead the negative prescription, that he should also plead the positive. On the contrary, it is enough if, in the event of the negative prescription being sustained, that party can make up a complete feudal title in his or her person.

Pleaded for the Respondent.—The possession of William Welsh, for a period of more than twenty years, must be ascribed to the entail under which he had a personal right whereon to found his possession; and there was no room for an action at the instance of the substitutes, who could not qualify any act of contravention as matters then stood.

2. The negative prescription is not pleadable by the appellant, Mrs Welsh Maxwell, who, so far from having a title in her person fortified by the positive prescription, is but an adjudging creditor, who must ascribe any possession held by her to an adjudication, the legal of which is still open; and upon which, possession had not followed after the date of the infeftment for a fourth part of the period which the law requires in order to convert an adjudication into a title of property.

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would, by possessing on apparency, have been liable universally. And at that time apparency was a very imperfect title. It also saved him the expense of a service."—*Hume's Session Papers.*

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3. The deed of entail and relative parts of Alexander Welsh's settlement were recognized by William Welsh, and homologated and approved of by him, in such a manner as to cut off all pretence of prescription having commenced, until infeftment was obtained on the foresaid charter of adjudication, 1793.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

"This was an appeal to your Lordships in the cause of Welsh *v.* Maxwell. Upon the best examination I have been able to give to the subject, and the principles to be applied to the consideration of the case, if none of your Lordships should be of a different opinion, it appears to me the judgment in the case ought to be affirmed." *

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, . *William Adam, David Cathcart.*
For Respondent, *Sir Saml. Romilly, Thos. W. Baird.*

NOTE.—Mr Napier, in his Commentaries on Prescription, has some excellent remarks on this case.

(Driving Deer from Common.)

MAJOR-GENERAL ROBERTSON of Lude, - - *Appellant.*

THE DUKE OF ATHOLL and DUNCAN ROBERTSON, sometime his Tenant, - - - *Respondents.*

House of Lords, 1st December 1814.

COMMONTY—RIGHTS OF DO.—The Common of Glentilt and Glenfender belonged in common to the Duke of Atholl and General Robertson, and was let to small farmers as pasture lands, for pasturing cattle, &c. The Duke's forests were in the neighbourhood, and the question arose, whether the Duke had right to give orders to his tenants to drive the deer off the Common, to the prejudice of General Robertson's right of hunting and killing the deer on the Common?—Held that the Duke might do so.

The respondent, the Duke of Atholl, stands heritably infeft "in toto et integro comitatu de Atholl, &c., cum libera fores-

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* From Mr Gurney's Short-hand Notes.

tria de Benchrombie, omnibusque alliis liberis forestriis dict. Comitatus, officio forestriæ, et priviligiis ejusd."

Of the forests in which the respondent, the Duke, and his ancestors, had been thus infeft, the lands or forest called Benyglo, Benvurich, and Tarff, form a part; and between that part of the forest ground called Benyglo on the east, and a part of it called Glentilt on the west, there is interjected a stripe of ground extending from north to south, about three or four miles in length, and above half a mile in breadth, which is called the Common of Glentilt and Glenfender. This stripe of ground called Glentilt and Glenfender has, for time immemorial, been possessed as a common property, and used, as was alleged by the noble respondent, for pasturing sheep and cattle by the family of Atholl, and that of Robertson of Lude. The noble respondent further stated, that about thirty different farms belonging both to the family of Atholl, and also to the family of Lude, had always enjoyed servitudes of pasturage and fuel, peat and divot, on the said commonty. From a plan exhibited, he also showed that the interest of the appellant was trifling, compared to what his was in the common. He also stated that he had given his small farmers, who had rights of pasturage on this common, instructions to drive the deer from the common back to the forest, and that Duncan Robertson, the other respondent, who was the Duke's tenant, had received instructions from the Duke, so to drive away the deer from the common.

The appellant, on his part, stated, that in virtue of their common right in this common, each of the proprietors, that is, the Duke and the appellant himself, was entitled to hunt and kill the deer, and all other wild animals resorting to the common, and this privilege, which is inherent in their right of property, can neither be lost *non utendo*, nor abridged by the more extensive exercise of it on the part of the other proprietor. The Duke of Atholl, therefore, could not, as was here done, arrogate to himself the right of driving away the deer from the common in order to send them to his own neighbouring forests, and thereby destroy the appellant's right of sport and of killing the game.

It was admitted by Duncan Robertson, that from Autumn 1803 he had turned off the deer which were trespassing on his farm of Fassacharie, and the common which adjoined to it, and on which he had a right of pasturage. He also stated, that if a tenant required any authority to prevent the pasture, for which he paid a *bona fide* rent, from being depastured by

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other cattle, or by wild animals, *most assuredly* he had that authority from the Duke.

These were the respective statements of parties, in a complaint brought by the appellant, before the Sheriff. The Sheriff dismissed the complaint, stating that, whether Robertson acted as a tenant of the Duke, having a right to pasture on the common, or by the authority of the Duke, as his servant, he was entitled to drive off the deer, to prevent the pasture from being hurt.

The appellant brought this judgment under review of the Court of Session. After various interlocutors, the parties were allowed a proof, chiefly as to the fact of driving off the deer, and whether this applied to the whole common, or only to that portion of it where Duncan Robertson had his right of pasture.

The proof bore very much on this, that the Duke's factor having heard that General Robertson's gamekeeper was in the pratice of killing deer on the common, he gave orders to Duncan Robertson, to be careful in driving the deer from the common into the forest, in order to prevent them from being killed on the common.

Dec. 19, 1809. The Court, after a proof, sustained the defences, and assoilzied the defenders from the whole conclusions of the libel, and decerned.

A reclaiming petition was given in, which was ordered to be answered. In his answers, the Duke admitted, "that the "appellant may kill deer any where. He also admits, that "wild animals have no owner, and may be appropriated by "the first occupant." But, he argued that, by the evidence on both sides, it was clear that the appellant had totally failed in the proof of the allegation, that he and his predecessors were in the immemorial practice of killing deer on the common, and the Court adhered.

May 22, 1810. On appeal to the House of Lords these interlocutors were affirmed.

For the Appellant, *Sir Saml. Romilly, John Haggart, D. M'Farlane.*

For the Respondents, *Wm. Adam, Ar. Fletcher.*

HUGH INNES, Esq., of Lochalsh, . . *Appellant;*

The Rev. ALEXANDER DOWNIE, Minister of Lochalsh, and the Reverend the Presbytery of Lochcarron, . . } *Respondents.*

House of Lords, 20th February 1815.

EXCAMBION—TRANSACTION—HOMOLOGATION.—An action was brought thirty years after the excambion of the old glebe belonging to the minister of Lochalsh, for the lands of Ardhill belonging to Lord Seaforth, to set aside and reduce that contract, on the ground that it was gone into without due authority from Lord Seaforth. Held that the transaction having been fairly gone into, and homologated, both by the Seaforth family and the appellant, the same could not be disturbed. Affirmed in the House of Lords.

An action of reduction and declarator was raised by the appellant against the respondents, to set aside and reduce a contract of excambion, by which, about thirty years ago, the old glebe belonging to the minister of Lochalsh, was exchanged for the lands of Ardhill, then belonging to Lord Seaforth, and now, by purchase, to the appellant.

The grounds of the reduction were, 1st, That the minutes of meeting of presbytery, said to have been written when the excambion was made, were informal, vitiated, and erazed. 2d, That neither the presbytery nor Lord Seaforth's factor, with whom they transacted, could legally make such an excambion. 3d, That Lord Seaforth gave no authority for the transaction at the time, and afterwards, when it came to his knowledge, he disapproved of it, and took certain measures for setting it aside. 4th, That the same was brought about by connivance between his lordship's said factor, Farquhar M'Rae, and the then minister of Lochalsh, Mr Murdock M'Iver.

The defence stated was that the excambion was a fair transaction, and gone about in a regular way, and that, in point of fact, it had been homologated, both by the Seaforth family, and by the appellant.

The Lord Ordinary ordered a condescendence of the facts as to homologation.

The Lord Ordinary, after the condescendence was given in with answers, pronounced a special interlocutor, reducing the excambion; but, on reclaiming petition to the Court, the May 15, 1810.

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Jan. 22, 1811.

Court pronounced this interlocutor:—"Alter the interlocutor "complained of, sustain the defences, assoilzie the defenders, "and decern; find expenses due to the defenders, allow an "account to be given in, and remit to the auditor to examine "the same and report." On reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought.

Pleaded for the Appellant.—As to the *first* act of homologation—the alleged silence and implied acquiescence, from the time of the transaction in 1776 to the year 1780, on the part of Lord Seaforth, when he sold the property, it is a sufficient answer to say, that Lord Seaforth, or his men of business, knew nothing of the excambion, until it was first mentioned by Mr M'Iver, in the process of suspension in 1779. The excambion, therefore, was, from beginning to end, a collusive and underhand transaction. But it is stated that Lord Seaforth had homologated the excambion, in the *second* place, by building office houses on Ardhill, which office houses were erected as attached to the manse. The answer to this is, that they were built by the factor, and not by Lord Seaforth or his agent, who were ignorant of the transaction for years thereafter. The *third* act of homologation alleged, was by Mr Mackenzie, who purchased the estate in 1779, not bringing any challenge of the transaction, but, on the contrary, had, in 1780, given Mr M'Iver no less than L.100 to be laid out in repairing one of the wings of these houses so built. The answer to this is, that Mr Mackenzie was ignorant of his right, and of the nature of the transaction. The other acts of homologation are all equally unfounded, and, therefore, the interlocutors ought be reversed.

Pleaded for the Respondents.—The excambion called in question by the appellant was regularly entered into about thirty years ago by the minister of the parish, with the consent of the presbytery on the one hand, and Mr M'Rae, factor for Lord Seaforth, on the other hand. 2d, At such a distance of time, the respondents cannot be called upon to produce the powers which Mr M'Rae received from Lord Seaforth, to enter into the transaction, but these powers must now be presumed to have been to the effect spoken of. 3d, Mr M'Iver, who was minister at the time the excambion was entered into, entered into possession of the new glebe of Ardhill, and he and his successors have remained in possession of it ever since; and the Earl of Seaforth immediately entered into possession by his tenants, of the old glebe of Kirkton,

and his lordship and his successors in the estate of Lochalsh, have continued in possession of it ever since. 4th, The transaction of the excambion was homologated in many different ways, by the acts of the Earl of Seaforth, of the present Lord Seaforth, and of the appellant himself, and their respective agents, and, in consequence of such acts of homologation, the original transaction cannot now be challenged.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *William Adam*, *Thos. W. Baird.*

For the Respondents, *Sir Saml. Romilly*, *John Connell.*

ALEXANDER PORTERFIELD of Porterfield, Esq., *Appellant.*

THE OFFICERS OF STATE and ALEXANDER DON, Esq., of Ochiltree, Titular of the Parish of Kilmacolm, The Right Honourable WILLIAM, LORD BELHAVEN, and Others, Heritors of the said Parish, } *Respondents.*

House of Lords, 24th February 1815.

LOCALITY—RIGHT TO TEINDS.—Circumstances in which it was held that an heritor had adduced sufficient title and right to the teinds of his lands, although in a former locality he had been localled in consequence of these titles having gone amissing. In the House of Lords the case remitted.

This was a question as to whether the appellant had a right to the teinds of his lands.

It appeared that in a locality of the teinds of the parish, after the minister had obtained an augmentation in 1758, his title-deeds and writings had been duly produced by the appellant's father, and in that locality effect was given to his right then produced.

In 1795, the appellant's father died; and in 1798 the minister of Kilmacolm raised a new process of augmentation, which he obtained accordingly. And when the usual locality which followed was prepared, it appeared that the appellant was localled on as having no right to his teinds. He therefore objected; but his title-deeds, by which he proved, on the

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former occasion, his right to the teinds, having gone amissing, the Lord Ordinary approved of the locality. He represented against this interlocutor, but his Lordship adhered; and, having made avizandum to the Court, the Court approved of the locality and decerned. On reclaiming petition the Court adhered.

Dec. 4, 1799. Feb. 3, 1801. May 23, 1804.

And against these interlocutors the present appeal was brought to the House of Lords.

In the meantime, and in the year 1806, the minister of the parish of Kilmacolm raised a new process of augmentation, in which a decree of modification having been pronounced, the cause was remitted to the Lord Ordinary to prepare the locality.

The appellant in the interval had discovered certain of his title-deeds, which had been lost on the former occasion, and which placed the matter of right to his teinds beyond dispute.

The Lord Ordinary, by a special interlocutor, found that these writings established a right to the teinds; but as the matter was already *sub judice* of the House of Lords, he sisted procedure.

May 24, 1812.

After hearing counsel in the House of Lords,

It was ordered and adjudged that the cause be remitted back to the Lords of Council and Session in Scotland, as Commissioners for Plantation of Kirks and Valuation of Teinds, to review the said several interlocutors complained of in the said appeal.

For the Appellant, *Sir Samuel Romilly, William Buchanan.*

NOTE.—Unreported in the Court of Session.

GEORGE LISTER, Executor of William Henry Anderson, son of the deceased Henry Anderson, Builder and Mason in Grenada, ... } *Appellant;*

JAMES SUTOR, Mason in Rothes, County of Elgin, ... *Respondent.*

House of Lords, 24th February 1815.

PARTNERSHIP—ACCOUNTING—ADJUSTED AND SETTLED ACCOUNT—Circumstances in which a party was entitled at the distance of years, and after his claims in the executry had been adjusted and settled, to insist that a certain heritable estate belonged to

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the partnership, not included in the former account so adjusted and settled, should be held as falling under the partnership, so as to entitle him to make this further claim. Held him entitled to a share in the heritable estate. Affirmed in the House of Lords.

Henry Anderson and John Sutor carried on, in the Island of Grenada, a partnership as builders and masons; and the question was, whether a plantation in Demerara, called Prospect Estate, belonged to the partnership equally, or to Henry Anderson, one of the partners, as an individual.

Both partners were now dead, and their estates in the hands of executors and their administrators appointed by will.

The executors of Henry Anderson had acted upon the footing that the Prospect Estate exclusively belonged to Henry Anderson, and had actually settled with the executors of Mr Sutor, as was evidenced by an account current between the executors and Anderson's estate, bringing out a balance as due Sutor's executors of L.2238, which was paid and settled without any reference to the Prospect Estate in the account, but, which was made out on the footing that he had no interest therein. Matters stood thus, until, after the distance of fifteen years, a claim was made by the respondent to an equal share of it as partnership funds and effects. It was stated in answer that there was a settled account signed by Mr Innes, one of the executors of Mr Sutor, which put an end to the present claim.

The chief evidence produced to show that the Prospect Estate belonged to the partnership, consisted of a power of attorney, signed both by Henry Anderson and John Sutor, the partners, wherein they empowered Joseph Innes "to see "and dispose of our just and equal half share of the cotton "estate aforesaid called Prospect," and to uplift all debts due to the copartnery. There were also letters and correspondence which established that the interest which Mr Sutor had in the Prospect Estate, was only a third share.

The Lord Ordinary found that one-half of the Prospect Estate was partnery concern, and belonged to them in the proportion of two-thirds to Mr Anderson, and one-third to Mr Sutor. On reclaiming petition, the Court pronounced this interlocutor:—"Adhere to the interlocutor of the Lord "Ordinary reclaimed against, in so far as it finds that the "land property of the Prospect Estate in Demerara was a "company concern, and held in the proportion of two-thirds "as belonging to Henry Anderson, and one-third belonging

Dec. 23, 1809.

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"to John Sutor; and remit to the Lord Ordinary to proceed accordingly."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—It appears from an account current produced, that this account was settled by Joseph Innes, the executor, as well of the will of Sutor as of Anderson, on the 15th July 1797, and a sum of L.2238 currency, was then paid to Innes, upon the footing that Sutor had no concern in the Demerara Estate, which settlement, if it could be opened up after the lapse of so many years, could only be upon evidence of the strongest kind; but it is admitted by the respondent himself, that the evidence upon which he relies is neither full nor direct, nor is it sufficient to establish his right, even if it were now open to discussion, while, on the other hand, there is evidence sufficient to negative the claim he now makes, which, if it could have been supported, it is impossible to believe would have been so long delayed.

Pleaded for the Respondent.—The only point in dispute is the simple fact, Whether the purchase and possession of one-half of the plantation called Prospect, in Demerara, was or was not a purchase and possession by the partnership or society of Anderson and Sutor; and, consequently, for the material behoof of the two partners, in the same proportions in which the other profits arising from their partnership, were divided? And of the affirmative of this fact, there is sufficient reasonable evidence produced in a matter where the *locus contractus* was distant, and as to which the period is remote. Nor is the weight of the evidence to be diminished, but, on the contrary, it is to be more highly esteemed, when it is considered that the poverty of the respondent, and the distance of his residence, have given to William Henry Anderson a very decided advantage, in the recovery of documents, and in the investigation of truth, he, Mr Anderson, having himself been in the West Indies during a considerable part of the progress of the litigation, while the respondent was confined to the north of Scotland.

After hearing counsel,

It was ordered and adjudged, that the interlocutor of the 14th May 1811, and the other interlocutors complained of, so far as they are consistent with the interlocutor of 14th May 1811, be, and the same are hereby affirmed: and it is further ordered and adjudged, that such other

interlocutors, so far as the same can be considered as inconsistent with that of the 14th May 1811, be, and the same are hereby reversed: and it is further ordered that the cause be remitted back to the Court of Session, further to proceed therein, as is consistent with this judgment.

For the Appellant, *John Leach*, *M. Nolan.*

For the Respondent, *Sir Saml. Romilly*, *P. J. Gordon*, *James Abercromby.*

NOTE.—Unreported in the Court of Session.

ARCHIBALD M'ARTHUR STEWART of Ascog, - *Appellant;*

JOHN KER, W.S., Common Agent in the Locality of Eddleston, - - - - *Respondent.*

House of Lords 27th February 1815.

LOCALITY—RIGHT TO TEINDS:—In a locality of the minister's stipend of the parish of Eddleston, it was objected to the appellant's titles, that no right to teinds was conveyed by the dispositive clause of his disposition, although mentioned in another clause of the deed. Held by the Court of Session, that he had no right to the teinds of the lands: reversed in the House of Lords.

This was a locality of the stipend of the parish of Eddleston following an augmentation of the minister's stipend, in which the appellant claimed a right to the teinds of his lands, so as not to be localled on as an heritor having no right to teinds, but only with the titular himself, and other heritors having right to teinds.

It appeared that the appellant had acquired his lands of Whitebarony from Sir Alexander Murray of Blackbarony. Sir Alexander's ancestors had acquired in 1593 the whole tithes of the parish, by a lease for a certain number of lives, and then for a long period after the termination of these lives. In 1688, Sir Alexander acquired from the Countess of Traquair the advocation, donation, and right of patronage of the parish church and patronage of Eddleston, and as such, it was stated he acquired right to the whole tithes of the parish not heritably disponed by the Acts of the Scottish Parliament, 1690, c. 23, and 1693, c. 25.

Sir Alexander Murray disponed to Mr Stewart, in 1732,

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the lands of Whitebarony. In the dispositive clause of this disposition there was no mention of tithes; but it appeared from other clauses in the deed, that the teinds were conveyed to him. The disposition was granted with a power to redeem or purchase back the lands, and the deed proceeds as follows, "But "in case I, or my assignee to the reversion, shall not redeem "the lands and roums above disponed, so as that the same "shall become the irredeemable property of the said Mr John "Stewart, his said spouse, and their foresaids; then they shall "be liable for a part of the cess and public burthens effeiring "to the valued rent of the said lands, which is hereby agreed "to be one-fourth part of the valued rent of my lands and "estate in the shire of Peebles, but they shall not be liable "for a proportional part of the minister of Eddleston, his "present stipend; but they shall be liable for any aug-"mentation of stipend, if any shall thereafter happen to be "obtained by the present minister, or any succeeding mini-"sters in the said parish, and that proportionally with the "other lands in the parish." "And because the sums now "advanced and discharged to me, are an agreed price *both* "for *stock and teind*, and that my right to the teinds being a "temporary right, and what will not absolutely defend from "some evictions that may emerge, therefore I bind and oblige "me, my heirs," &c., "to free, relieve, and disburden the "teinds of the foresaid lands and roums now disponed of, and "from all evictions of the said teinds that shall happen to "occur any manner of way, and shall keep the said Mr John "Stewart, his said spouse, and their foresaids, harmless and "skaithless from the said evictions, whenever the same shall "happen on any account whatsoever, and of all cost, skaith, "and damage, that they or their foresaids may happen to "sustain there-through." Two months thereafter Sir Alexander had conveyed to the Earl of Portmore certain lands within the parish, with the teinds, great and small.

The common agent in the locality objected to the first disposition in favour of the appellant's ancestors, as giving no right to the tithes. He stated there was no mention of the tithes in the dispositive clause, and, besides, there were other indications of intention, which showed that Sir Alexander had not intended to convey these. In the deed itself, he states that his own right was "of a temporary nature," and it was further stated, that Sir Alexander, a few months after, had granted to the Earl of Portmore, a disposition, disponing to him certain lands within the parish, "with the teinds, great

" and small, parsonage and vicarage of the lands, and others " disponed," from which it was inferred, that if Sir Alexander had intended to give a right to the teinds to Mr Stewart, he would have made use of the same words.

In answer to this, the appellant stated that it had been determined as established law, that in questions of locality, it is if no importance in what form the right to tithes has been conveyed, provided the patron or titular of the tithes, who is truly the party, can make no just objection to it; thus, 1st, A perpetual lease of tithes or an obligation to renew a lease from time to time for ever, upon payment of a certain fine, has been held to create an heritable right. 2dly, It has been decided that persons possessing the tithes of their lands by tacit relocation from the Crown, as coming in place of the bishops, are to be localled on in the same manner, as if they had a proper right to tithes. 3dly, An obligation by the titular of the parish, to warrant a particular heritor against future augmentions has, by the constant practice of the Court of teinds, been held in a locality to be equal to the most formal conveyance of tithes. From all which, it is plain it is a question solely with the titular, and that if the titular is barred *personali exceptione* from challenging the right produced, the heritor is entitled to the benefit of it in the process of locality. It is plain that the titular is barred *personali exceptione* here, for he declared in the disposition that he received a price for both stock and teind, and that he sold the teinds along with the lands, and received a price accordingly. Besides, in two previous localities, one in 1772, and another in 1795, his lands were localled on as having a right to his teinds.

July 11, 1759.

July 22, 1784. Gordon v. Earl of Fife.

Dec. 17, 1788. Common Agent in Kirkliston v. Gibson Wright. Fac. Coll., vol. x. p. 90.

The Lord Ordinary found: " That Mr M'Arthur Stewart " has not instructed such a right to his teinds as to entitle his " lands to an exemption from being localled upon in propor- " tion with the lands of the other heritors, and therefore repels " the objections." On representation, the Lord Ordinary " Finds that the representer's lands are liable to be localled " upon *proportionally with the lands of other heritors in the* " *parish, who have no heritable right* to their teinds, and there- " fore refuses the representation, adheres to his interlocutor." And on reclaiming petition, the Court adhered.

May 12, 1804.

May 14, 1805.

May 29, 1805.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant. — 1st, Although the scheme of locality, which is objected to by the appellant, was prepared by the respondent calling himself common agent for

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the heritors, it must be liable to the same objections at the instance of individual heritors, as if the allocation had been made by the patron and titular, whose province it is to allocate upon the teinds of the parish, whatever stipend is modified to the minister; and 2d, The predecessor of the appellant in the present case is clearly established to have purchased from the titular the teinds of his lands in this parish, and paid their price so far back as 1732. The appellant is consequently by that transaction entitled to the drawing of his own teinds, and to be locallled on for stipend, only proportionally with the titular himself, and such other heritors in the parish as have acquired rights to their teinds in the same manner as his lands were locallled on in the process of locality in 1772, and in the process of locality in 1795.

Pleaded for the Respondent.—Tithes in Scotland, held in property by laymen, have long formed distinct real estates, which, as in the case of lands or other feudal subjects, can only be conveyed by a charter or disposition. Delivery is made by an appropriate symbol, analogous to the symbols used in cases where a right to tithes is granted by special statute (Here a passage from Erskine was referred to, B. ii. tit. 10, § 40).

Purchasers of real estates in Scotland rely on the records. But if a mere intention to convey tithes not expressed in what are termed dispositive words, were sufficient to give a right to tithes, the security arising from the records would be lost. Now, in the present case, the appellant founds on the disposition executed by Sir Alexander Murray in 1732; but by this disposition he merely conveys certain lands, but does not convey the tithes of these lands. Consequently, no right to the tithes could be vested by this disposition in the person of the appellant's predecessor. Intention, it has been observed, would not be sufficient, but it does not appear that Sir Alexander Murray had an intention to give an heritable right to the tithes. He had two rights in his person, the one founded on the lease, which right was of a temporary nature, the other founded on the disposition by the Countess of Traquair, under which he became titular of the tithes of the parish. It may not be improbable that he intended to impart his temporary right to the appellant's predecessor; but it is utterly inconceivable that, if he had intended to grant an heritable right, he should *not* have expressly conveyed the tithes.

After hearing counsel,

It was ordered and adjudged, that the interlocutors of the

12th May 1804, and 14th and 29th May 1805, be, and the same are hereby reversed. And it is declared, that the persons entitled, under the deed or disposition, 21st August 1732, made by Sir Alexander Murray of Blackbarony, Baronet, in pursuance of the contract of marriage therein recited, are entitled to hold the teinds of the lands specified in such disposition heritably against the said Sir Alexander Murray, and his successors, patrons, and titulars, of the said parish of Eddleston; and that in localling the stipend of the minister of the said parish, the teinds of the lands of the appellant comprised in such disposition, ought to be considered as having been heritably disponed by the said Sir Alexander Murray by the said deed of disposition of the 21st August 1732. And it be further ordered, that the cause be remitted back to the Lords of Council and Session in Scotland, as commissioners for plantation of kirks and valuation of teinds, to proceed in localling the stipend of the ministers of the said parish, in such manner as shall be consistent with this declaration.

For the Appellant, *Wm. Adam, Jas. Moncrieff.*

For the Respondent, *John Greenshields, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll., vol. xvi., p. 279.]

Sir JAMES STEWART DENHAM of Coltness, Baronet, *Appellant;*

Colonel WILLIAM LOCKHART of the 30th Regiment of Foot, and the Rev. Dr JOHN LOCKHART, one of the Ministers of Glasgow, ... *Respondents.*

House of Lords, 20th March 1815.

ENTAIL — SALES — PROHIBITORY, IRRITANT, AND RESOLUTIVE CLAUSES.—An entail contained an express prohibition against selling, but the irritant and resolutive clauses omitted to fence against sales, and the estate was sold. In an action brought by the next substitutes, to have the heir who sold the estate to account for the price to the next substitutes, and to re-employ the same in the purchase of land to be entailed in terms of entail. Held

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that a simple prohibition against selling the estate is good in a question between heirs, to the effect, that though Sir James Stewart might sell the estate, yet he was bound to account for the price to the next substitutes. In the House of Lords, the case remitted for reconsideration.

The appellant was institute in the entail of the Westshiel Estate, the respondent, Colonel Lockhart, was the nearest heir of line of the late Sir William Lockhart Denham of Westshiel, the maker of that entail, and he and the other respondent were substitutes under that entail.

The respondents had, in a former action, brought a declarator to have it found, 1st, Either that the appellant, defender in that action, was specially prohibited from selling the lands, or granting any right by which they might be carried off from the respondents' substitutes in that entail; or 2d, That if it should be found that, notwithstanding the foresaid prohibition and clauses, irritant and resolutive, the said defender might sell the lands, then to have it found and declared, that the said defender was accountable to the substitutes in the said entail, in their order, for the price of the said lands and estate.

1775. The deed of entail set forth in the dispositive clause as follows:—"With, and under the burdens, conditions, pro- "visions, clauses, irritant and resolutive, after expressed, I "bind," &c., "to make due and lawful resignation in the hands "of my immediate superiors, of all and whole the lands and "others after specified, for new infeftment to be made and "granted to the heirs male of my own body, and the heirs "male of their bodies," &c., "whom failing, to Sir James "Stewart of Coltness, Baronet, and the heirs male of his body, "whom failing," to a number of substitutes therein set forth. The heirs of entail were expressly prohibited from selling the estate or any part thereof, by the following clause,—"Nor "shall the heirs of entail have any power or liberty to sell, "alienate, or wadset the lands and others foresaid, or any "part thereof, or even grant provisions to younger children, "sons or daughters, except as hereafter provided, whereby the "lands and others foresaid may be any ways affected; or "grant any heritable or moveable bonds, infeftments of annual "rent, or any other rights or securities whatsoever, whereby "the lands and others foresaid may be any ways evicted or "carried off, to the prejudice of the next succeeding heirs of "tailzie." And, after the irritant and resolutive clauses, it concluded with this clause, "With and under all which pro-

"visions, conditions, restrictions, irritances, and burdens above "mentioned, these presents are granted, and to be accepted "by my heirs of tailzie aforesaid, and no otherwise."

The clauses irritant and resolutive, were defective, in so far as they omitted to mention sales. Thus, "If any of the "said heirs of entail shall not use the name and arms of "Denham, or shall alter and innovate this present tailzie, "or invert the succession from the order hereby appointed," &c., "or wadset the lands, or if they shall contract any debts "or grant any provisions, or grant any bonds, either heritable "or moveable, or other rights or securities, whereby the lands "and others aforesaid may be affected, evicted, or carried "away, to the prejudice of the next succeeding heir, then not "only shall the debts and deeds so to be contracted or done "by them," &c.

June 8, 1809.

The Court, of this date, found upon the report of Lord Newton, "That although the defender is laid under a pro- "hibition against selling, as found by the Lord Ordinary's "interlocutor of 8th March 1808, which, on this point, is "final; yet the prohibition is not fenced by irritant and re- "solutive clauses, so as to restrain the defender from making "a voluntary sale to an onerous purchaser, and, therefore, "recall the interdict, and, *in hoc statu*, dismiss the action *quoad* "*ultra* and decern."

The interdict here referred to, had reference to the interdict craved to prohibit a sale of part of the estate which was then in the course of being completed. The appellant thereafter proceeded and accomplished a sale of the estate. Whereupon, the respondents brought the present action of declarator, to have it found and declared that the appellant, having sold the estate, had thereby contravened the prohibition against the sale of the same, and was bound to account to the substitutes in the foresaid entail, in their order, for the price of the said lands and estate, and that he is bound to lay out the same in the purchase of other lands at the sight of such substitute heirs.

The defences to this action were, 1st, That the title under which the estate of Westshiel descended to the appellant did not restrain him from selling or disposing of it or its proceeds on sale as he saw proper. 2d, This point has in fact been already determined by the decision of the Court, in a former litigation between the parties to the present action; and the defender having, under the authority of that decision, sold part of the lands, the price became his own exclusive property, which he is not

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bound to re-employ in the manner stated in the libel, nor to account for, either in whole or in part, to the pursuers (respondents). The respondents, on their part, pleaded *res judicata*, on the ground that the decision in the former action had finally determined the question.

June 11, 1811.

Upon a full argument, and citation of authorities, the Court pronounced this interlocutor:—"Upon report of the Lord "Justice-Clerk, in place of Lord Glenlee, and having advised "the mutual information for the parties, the Lords repel the "defences proponed, and decern, and remit to the Lord "Ordinary to proceed accordingly; find the defender liable "in the expense hitherto incurred, and remit to the auditor "to report on the account thereof when lodged."*

Against this interlocutor the present appeal (leave having been sought and obtained to appeal), was brought to the House of Lords.

Pleaded for the Appellant.—In the deed of entail executed by Sir William Lockhart Denham, and under which the respondents are called as substitutes, there are no irritant and resolutive clauses applicable to the prohibition against selling; in consequence of which, the Court of Session have found that there was nothing in the entail which could prevent the appellant from selling the estate of Westshiel, which has, accordingly, been done. And there is no such *jus crediti* in the respondents as can entitle them to demand a reinvestment of the price. They had only a *spes successionis*: for the entail without irritant and resolutive clauses, could give no more than a hope of succession. Suppose the appellant had been bankrupt, and that his creditors sold and sought to participate in the price. In such cases it surely cannot be maintained that any antecedent, or existing *jus crediti*, in the substitute heirs, could prevent the creditors from appropriating the price in extinction of their debts.

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* Opinions of the Judges:—

"The judges were of opinion that the simple prohibition did give a *jus crediti* to the substitutes, though they were merely personal creditors, that they no doubt had not the benefit of the statute, as they would have had, if the entail had been complete, which would have made them real creditors, and might be disappointed if the heir in possession spent the whole, or if it was carried off from them by his creditors; but that so long as any part of the price remained, they were entitled to insist on its being secured in terms of the entail."

2. The estate, therefore, being sold, the object and intention of the entailer are completely and effectually frustrated, and it is equally impossible to know or to discover what would have been his intention as to the disposal of the money which has been received as the price of the estate.

3. By the Act 1685, c. 22, it is lawful to tailzie "lands "and estates," but there is no authority given by that statute to entail a sum of money, while such measure is equally novel, inexpedient and illegal.

4. The interlocutors pronounced by the Court, in the first and the last actions, seem to involve a contradiction. By the interlocutor in the first action, it was found that the appellant might sell; the sale was, therefore, a legal measure. By the interlocutor in the second action, he has been subjected in reparation and damages, which are the usual consequences, not of a lawful, but of an illegal act. But the demand of the respondents is equally inconsistent in another view. The demand is to re-employ the price, and, therefore, he asks the Court to do that for which the entail gives no authority. If he is to re-employ the price, in what manner is this to be done? And who has the requisite authority to prescribe to him how this is to be done? Is it to be done by purchasing lands to be entailed, and is this entail to be *defective* in the irritant and resolutive clauses as the former? or is it to contain complete irritant and resolutive clauses? These are questions which are difficult to solve, in the respondents' view of this case.

Pleaded for the Respondents.—1st, The interlocutor complained of, is a necessary consequence of the previous interlocutor pronounced by Lord Newton, Ordinary in the former action, finding that, "The defender is laid under a prohibi-"tion against selling the lands contained in the said deed," which interlocutor was acquiesced in by the appellant, and accordingly is stated in the subsequent interlocutor of the Court, dated 8th June 1809, as being on this point final. It is therefore *res judicata*, that the entails, under which alone the appellant has any right to the estate, prohibited him from selling the lands so as to disappoint the right of the other substitutes; and it must follow, that by a voluntary breach of that prohibition, he becomes liable to indemnify the respondents. In other words, he must re-invest the price which he has received for the entailed lands, in such a manner as to secure the right of succession belonging to the different substitutes. In that former action, there was an alternative conclusion similar to that which has now been sustained by the Court,

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and though the Court did not then pronounce judgment upon it, yet they signified their opinion very clearly, and from the terms of these interlocutors, used such expressions as imply that opinion. If deeds of entail were to be interpreted and enforced like other deeds, and it does not appear that any good reason can be assigned why a different rule should be applied to them, from what is applied to other deeds, it is plain that the appellant ought to have been prevented, even from accomplishing the sale, especially as an inhibition was used against him, which, according to the opinion, both of Sir Thomas Hope and Sir George Mackenzie, is sufficient to set aside all voluntary deeds. By the publication and recording of inhibition, which, in the law of Scotland, is requisite to make them effectual, every purchaser was put upon his guard, and consequently, could not plead *bona fides* in support of his purchase. In this view the respondents might have had good ground to appeal against the first action; and if there were not some intermediate substitutes which made their right of succession more distant, they would have brought that point also before your Lordships. But however doubtful such a point might be, in respect of the irritant and resolutive clauses being deficient, yet that can only go the length of making the sales effectual, in so far as regards the purchaser; it never can dissolve the obligation imposed upon the appellant not to sell the estate. A person may have a *power* to contravene his own titles, but it is impossible that he can have a *right* to do so. To suppose this, would be nothing less than a contradiction in terms; neither can any thing be more absurd than to suppose that a person, by doing an improper deed, and which he is expressly prohibited from doing, shall thereby enlarge his own right, and convert a limited and entailed fee into a fee simple, unfettered by every limitation, and not even under the destination of succession, so anxiously and explicitly laid down by the proprietor of the estate.

2d. Independent of the effect of the former judgment, the decree of the Court below, now appealed from, is founded upon the clearest principles of law and justice. One of the first principles of the law of Scotland, and it is believed of every other civilized land, is, that every person holding property unfettered by any limitations, may dispose of it, in what manner and to whatever persons he thinks proper. It was in virtue of this principle, and this principle only, that the appellant acquired any right to the Westshiel estate. He was not the heir-at-law of Sir William Lockhart Denham, the

maker of the entail, and it was only in consequence of the validity of the entail, that the respondent was cut out in the first instance from the succession. But surely the same principle which empowered the maker of the entail to alter the legal succession, by bringing in a stranger institute who was not *alioque successurus*, must empower him to lay the institute under a prohibition of selling the estate, by which the estate, through the various substitutes, is made to return to the heir-at-law. In virtue of the prohibition against selling, therefore, there is a *jus crediti* vested in all the substitute heirs, and a corresponding obligation upon the part of the appellant, not to defeat that right *in any manner whatsoever;* and therefore by the appellant voluntarily contravening the prohibition, and so violating his obligation, he becomes liable to indemnify the substitutes, by accounting for the price, and securing it in the same terms as those of the original entail.

3d. The argument of the appellant proceeds entirely upon confounding things which are quite distinct and separate. In questions between heirs and creditors, or onerous purchasers, the rule of law is quite different from what it is amongst heirs themselves. In the first of these, an entail, which is not fortified by all the requisites of the Statute, 1685, c. 22, cannot be effectual against the creditors or onerous *bona fide* purchasers. But, in the other case, the mutual rights and obligations of the *heirs, in question, among themselves, are valid and effectual without any regard to the* Statute, 1685. These rights and obligations are founded upon the principles of common law; and a voluntary contravention of any prohibition or condition in the entail or deed of settlement, is a direct infringement upon the right of the future substitutes, and as such entitles these substitutes to indemnification and redress.

Cumming Gordon. July 29, 1761. Fac. Coll., iii., p. 127. Mor. 15,513.

4th. The difficulties alleged on the part of the appellant, in carrying the judgment of the Court of Session into effect, are altogether imaginary. Nothing is more common in the practice of the law of Scotland, than similar provisions in various deeds of settlement, and particularly in marriage contracts. There was no difficulty whatever found in arranging matters in the case of Cunninghame of Bonnington, and it will be observed, that the interlocutor now appealed from contains a *remit* to the Lord Ordinary to apply the judgment of the Court; in other words, to arrange the terms and manner of securing the price for the benefit of the substitute heirs of entail.

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After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,*

(After stating the names and situations of the parties, and the clauses of the deed of entail 1775, and mentioning the first action between the parties, and the proceedings therein in regard to the two bills of suspension and interdict, proceeded as follows:)

"On the 8th of June 1809, the Court pronounced an interlocutor, finding, that though the defender, the present appellant, was laid under a prohibition from selling, yet the prohibition was not fenced by irritant and resolutive clauses, so as to restrain the defender from making a voluntary sale to an onerous purchaser, and therefore *in hoc statu* the Court dismissed the action.

"The appellant exercised this power of selling, and sold the principal part of the estate, and thereafter a new action was brought by the respondents, to have it found and declared, that the appellant was bound and obliged to lay out the price of the lands sold, to be settled on the same series of heirs, and under the like provisions and restrictions, as in the former deed of entail, or to lay out the same on landed security, to be settled in a similar manner.

"It is stated that the pursuers were remote substitutes, under the original entail, but with this, I conceive, we have nothing to do; it is not denied that they had a right to appear in Court as pursuers in this action. The defences were, that the appellant was not restrained from selling, and that this having been already decided by the Court, he had, in fact, sold part of the lands, and that thereby the price became his own exclusive property.

"On the 6th of December 1810, the Lord Ordinary, before whom this cause came, ordered the parties to give in informations.

"Informations having, accordingly, been given in, and the cause with these reported to the Court, the Court on 11th June 1811, pronounced the judgment at present appealed from, repelling the defences, and remitting to the Lord Ordinary *to proceed accordingly.*

"A remark was made upon the latter part of the judgment, that the Lord Ordinary had not been instructed how he was to proceed; but, if your Lordships had agreed with the other part of the interlocutor, I should not have considered that you would have thought this latter part of the interlocutor wrong.

"The other part of it decided on the merits of the questions depending between the parties, but as it was only interlocutory the appellant applied for, and obtained, leave from the Court to appeal.

"It has been long and repeatedly settled by decisions of the

* Taken by Mr Robertson.

Court below, and of your Lordships, that where there is only a prohibition from selling in a deed of entail, and such prohibition is not fenced by irritant and resolutive clauses, the heir of entail may sell. Scarcely a month passes in which we do not hear this doctrine stated, and assented to.

"In many of those cases, it appears that the sale was strenuously opposed; yet it is strange, where so much property was at stake, that these cases had not been followed up by some proceeding enforcing the laying out of the price, and that this point also should not long ago have been at rest; yet it appears that in this cause the question was learnedly discussed, and only carried on the Bench by the narrowest majority against the appellant. The person, too, who gave his casting voice in favour of the respondents, thought the question a very doubtful one; but he deemed it right to rest upon a former case, in which, however, he did not think the point had been minutely discussed.

We have very little help, therefore, from decisions in Scotland. In this country, if a person makes a voluntary settlement of an estate he may, nevertheless, sell it for a valuable consideration; but unless he has reserved a power of altering, he cannot revoke the former voluntary settlement.

"In courts of equity in England, when this matter was discussed, it was said to be strange that if he sold, the price should be his own, and yet that equity should prevent him from gratuitously altering the former settlement; and it was contended that the same equity should attach upon the price. But it is solemnly decided that equity did not interfere in regard to such price.

"What the precise principle was, upon which this point was decided, it is difficult to say, but it has been considered, that where there is a legal power to sell, the most convenient doctrine is to hold that the voluntary settlement should neither bind the purchaser nor the price.

"There is another class of cases in our law which has some relation to the present, those of *quasi* tenants in tail of estates held for lives. Where a mere tenant for life takes a renewal to himself, it is subject to the same trusts as the former estate; but in the case of a *quasi* tenant in tail, if he takes a renewal to himself, he holds the estate discharged of the trust, and is not bound to those in remainder.

"There is this difference between that class of cases and the present case, as decided by the Court below, that here, though you may sell, yet sell as often as you will, you must, if you make a new purchase, have it settled to the same uses as before.

"I have looked upon this as a case of great difficulty, and of great importance. I have looked for decided cases, and for opinions of text writers, but I have found nothing to guide us to a decision on this very important point. I have considered it best,

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therefore, to recommend to your Lordships to remit this cause to the Court below, and to direct the division to which it belongs to take the opinion of the other division.

"I am quite confident that the House would proceed with a degree of rashness, were they finally to decide this important question as it stands at present; we ought previously to obtain all the information thereon which we can have, and I move, therefore, that it be remitted accordingly."

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor complained of in the said appeal, and the judges of the division of the Court to which this cause shall, after this remit, belong, are hereby directed to require the opinion of the judges of the other division in the matter or question of law arising in this case according to the Statute.

For the Appellant, *Sir Samuel Romilly, Wm. R. Robinson.*
For the Respondents, *David Monypenny, John Dickson.*

NOTE.—It is stated by Mr Sandford in his Treatise on Entails, that the case did not proceed further under the remit, but in the Ascog case this question was finally settled. *Vide* W. and S. App. Cases, vol. iv., p. 196.

The compiler cannot sufficiently commend a work by Mr Duncan, advocate, on the subject of entails, in the form of a digest of cases where entails have been challenged, on the ground of the prohibitory, irritant, or resolutive clauses being defective. The cases are brought down to the latest date, neatly and succinctly stated, and arranged in a systematic order, such as must prove of great practical utility in this department of the law.

GEORGE BROWN, late Deacon; ANDREW WADDELL, present Deacon; ALEXANDER MORISON, Collector, and WILLIAM COWAN, Clerk of Weavers' Society of Old Monkland, . . . } *Appellants;*

ALEXANDER MURDOCH, THOMAS ROSS, JAMES WALKER, JAMES MEIKLE, THOMAS ALLAN, and JOHN WALLACE, all Feuars of Baillieston, . . } *Respondents.*

House of Lords, 20th March 1815.

DEED—SOLEMNITIES—STAMP ACTS.—Circumstances in which an

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agreement which was written in the minute-book of a society, and which conveyed to certain parties a right to a well, was sustained, although it was not written on stamped paper. Reversed in the House of Lords, on the ground that no legal evidence of the agreement appeared, and that the Court ought not to have admitted the minute-book as evidence of the agreement, it not being stamped according to the Acts of Parliament.

The appellants are members and office-bearers of the Weaver Society of Old Monkland, who are possessed of considerable property, including a piece of ground, with houses, in Baillieston, in the county of Lanark.

In 1804, it was alleged an agreement had been entered into by their predecessors in office, by which the right or privilege of a well constructed by the Society within its own feu at Baillieston, had been transferred or proposed to be transferred to the respondents, they paying always a share in repairing and deepening the well, and furnishing the same with a leaden pipe.

The successors in office of the Weaver Society inclined to dispute this right; and action was brought before the sheriff on the agreement, and as it was unstamped, the summons contained a conclusion to compel the members or the office-bearers representing the Society, "to procure extended and "signed in a formal and valid manner on stamped paper, "the foresaid agreement."

The agreement thus alluded to, contained a clause of registration, and was duly signed and tested, and was written in the books of the Society. It was unstamped.

The defence to this action was, that, independent of every other objection, every such deed conveying land, or a right of property heritable in its nature, must be written on paper duly stamped.

An interdict being also brought, the sheriff conjoined these actions, and afterwards decerned against the Society's office-bearers in terms of the libel, at the instance of the respondents.

An advocation having been brought by the appellants of this judgment to the Court of Session,

The Lord Ordinary advocated the cause, and recalled the interdict and decerned. On representation, his Lordship pronounced this interlocutor:—"In respect that it is not June 20, 1809. "alleged in the answers that there is not a sufficiency of water "in the well in question to supply both the Society of Weavers "in Old Monkland, and the representers, with the neces-

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" sary quantity of that useful commodity; finds it was no " unreasonable or improper act of administration in the " managing of the Society, to communicate the same to the " adjacent feuars, on their making payment of a large pro- " portion of the requisite sum for repairing and deepening " the well, and furnishing the same with a leaden pipe, there- " fore alters the last interlocutors, and remits the cause to " the sheriff *simpliciter;* and dispenses with any represen- Jan. 19, 1810. " tation against this interlocutor." On reclaiming petition to " the Court, the Court adhered, with expenses.

The appellants then brought the present appeal to the House of Lords, stating that they did not at present insist upon any of the defences maintained in their behalf, before the Court of Session, except the defence arising from the circumstance of the document (whether it is to be deemed a formal deed, or merely an agreement), upon which the pursuers founded, having been all along unstamped.

Pleaded for the Appellants.—By the common law of Scotland, the intervention of writing is essential and indispensable to every permanent transaction affecting land, or any other heritable subject. Upon such point, which is quite clear, and universally acknowledged, it is unnecessary to cite authorities; and the appellant shall, at present, merely refer to the explicit authority of Mr Erskine, in his Institutes, B. iii., tit. 2, § 2. Nor is this rule less applicable to the constitution of servitudes or burdens, than to dispositions, tacks, and other rights affecting heritage, as appears from the same author, B. ii., tit. 9, § 3. The only apparent exception, is that of servitudes which have been enjoyed beyond forty years, in which case, the claimant of a servitude, instructing uninterrupted possession for that length of time, is not bound to support his pretensions by likewise instructing and exhibiting the original grant. In the present instance, the pursuers claim a right of servitude over the heritable property of the Old Monkland Society of Weavers; and it is not, and cannot be, disputed, that this right or servitude, which is not alleged to have subsisted farther back than the year 1804, must be instructed and supported by a document in writing. Accordingly, the pursuers have referred to the unstamped deed or agreement which is before recited. But it has been shown that according to the clear and positive enactments of the Statute which were then in force, the same, whether it shall be regarded as a deed or agreement, is utterly inadmissible in any court of law to constitute a binding or legal deed. The

general reference to the previous Statutes substantially to the same effect, and almost in the same words with that which has been already recited. A similar reference applicable to both deeds and to agreements, occurs in the 12th sec. of the Statute 23 Geo. III., c. 58, which, however, is qualified by the explanation in the 5th sec. thereof, "Provided also that no "memorandum or agreement not stamped shall be deemed to "be void in case the same shall be stamped at the head office, "or the said duty shall be paid thereon, and a receipt given "thereon for the same, by the proper officer receiving such "duty within twenty-one days after the same shall have been "entered into." And in the 7th sec. of the other Statute in the same year, chapter 111, which applies specially to *deeds*, there is an express enactment, that "*no deed shall be pleaded* "or given in evidence, or be good, useful, or available in any "manner whatever, unless the same shall be stamped as "required by this Act." So that, whether it is regarded as a deed or an agreement, the deed is equally null and void.

35 Geo. III., c. 30; and 37 Geo. III., c. 90, § 9. Superseded by 7 and 8 Vict., c. 21, § 5; et 13 and 14 Vict., c. 97, § 12, in which similar clauses are provided.

The circumstance of the document being written in a book, while this cannot lessen its liability to the stamp duties in force at its date, appears only to be a circumstance of aggravation, and tending only to evade the stamp law.

Pleaded for the Respondents.—The respondents were invited by the appellants, or those whom they represent, to join them in deepening the well in question, upon certain terms, the evidence of which the appellants took down in writing, and retained in their own hands; and the respondents having fully performed their part of the agreement, and paid their money, are entitled to have the deed executed by the appellants on stamped paper, as concluded for in the summons.

After hearing counsel:—

The LORD CHANCELLOR (ELDON) said,

"My Lords,

"I feel considerable distress in advising your Lordship to dispose of this cause in the only way in which I think you can dispose of it. The appellants are members of the Weavers' Society of Old Monkland; the respondents are feuars in that neighbourhood." (Here his Lordship stated the matter at issue, and the different proceedings that had taken place between the parties, in regard to the deepening and repairing of the well in question; and, after reading the minutes of the 13th April 1804, and 21st and 28th August 1804, and the instrument, bearing date the 10th September 1804, as also the summons, he proceeded thus):—

"It was urged in this case that the agreement of the 28th August 1804, was a parole agreement, and did not need stamping,

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BROWN, &c. v. MURDOCH, &c.

but it appears to me that the agreement was not complete till the 18th September 1804.

"The real question in this case is, Whether this agreement required a stamp or not? And though the respondents' summons contained a conclusion that they should have a *double* of the agreement extended on stamped paper, yet this inferred that there was an agreement of which a double could be had.

"It is true that this agreement, or evidence of an agreement, was before the Court, though the agreement was not stamped. But I am afraid it was the duty of the Court to take care of this, and it was not in their power to take as evidence of an agreement what the Acts of Parliament said should not be evidence.

"Yet one feels the hardship towards the respondents extremely in this case, and the expense incurred must bear hard upon them in a matter, the value of which is so small. The parties should have called for this agreement in the first stage of their proceedings, and have got it stamped. The single question here is, if a suit can be maintained upon a writing which the Court are not entitled to look at?

"There was another question made in this cause, Whether the managers could bind the Society? It is not necessary for us to give any opinion as to this.

"I am constrained, under the circumstances of this case, to move that the judgment should be reversed. We can interfere no farther."

It was ordered and adjudged that the several interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is declared, that there being no stamp upon the entry in the books of the Society,* whether the same is to be considered as the agreement between the parties, or as evidence of that agreement, no legal proof having been made of any agreement between the respondents and the persons described in the interlocutor of the 20th June 1809 as the managers of the Society, even if such managers had authority to bind the Society by an agreement with the feuars. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein, and with respect to the proceedings before the Sheriff, as is just and consistent herewith.

For the Appellants, *Ar. Colquhoun, Thos. Plumer, Wm. Erskine.*

For the Respondents, *Sir Sam. Romilly.*

NOTE.—Unreported in the Court of Session.

* Something awanting here, perhaps the words "it does not appear."

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THE EARL OF TRAQUAIR, &C. v. BURROWS, &C.

The EARL OF TRAQUAIR and JOHN ANSTRUTHER, Esq., his Trustee, - - - - - *Appellants;*

WALTER BURROWS and Others, Assignees under a Commission of Bankruptcy issued, against PATRICK MORGAN and ARTHUR STROTHER, Merchants in London, - *Respondents.*

House of Lords, 20th March 1815.

DEBT—CONSTITUTION—FOREIGN BOND—SURETY—BENEFICIUM ORDINIS.—(1.) Circumstances in which a notarial copy of a bond granted in Spain, together with other evidence was sustained as proving the constitution of the debt. (2.) Held that a cautioner in this bond was not entitled to plead the privilege of discussion, he being bound, not only "as surety," but also as "principal payer."

While the Earl of Traquair was residing for some time in Madrid, during the war, he became surety in a Spanish bond, granted by the debtor, Don Andres Fletcher, to one Don Arthur Strother. To this bond the respondents acquired right, as the official assignees of Messrs Morgan and Strother, to whom the same was alleged to have belonged as copartners.

A demand was made in this country against the Earl for the contents of the bond, £1084, 11s. It appeared that in Spain, the originals of bonds are executed in books of record, the party holder of the bond only getting an attested copy. The Earl's trustees refused payment, stating that, from various circumstances, they doubted whether the paper in question did constitute a proper debt, and if it did so, it was strange that no demand had ever been made on the Earl while he remained in Spain. Though *ex facie* of the document, the Earl was merely a surety, yet no demand had been made in Spain against Fletcher, the principal obligant.

Action having therefore been raised, it was pleaded in defence, 1st, That the original bond or obligation, which was the foundation of the claim, was not produced. 2d, That, even if produced, the pursuers must show that they have discussed the original debtor by diligence before coming against the surety. Lord Polkemmet, after hearing parties at considerable length, pronounced this interlocutor, "The Lord Ordinary having considered the libel with the defences and writs produced, and heard parties' procurators, before answer, ordains the pursuers to state, in a condescendence, what Feb. 6, 1800.

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"evidence they have produced, or can instruct that the debt "sued for is still owing; and likewise to state what diligence, "if any, has been used for recovering of said debt against "the principal debtors in the bond libelled, and that against "next calling."

June 18, 1801.

The respondents reclaimed to the Court, and the Court were pleased to "remit to the Lord Ordinary to hear parties "further, and to proceed and determine upon the whole cause, "as to his Lordship may seem just."

The respondents then applied to the Lord Ordinary to have the judicial examination to be taken of the Earl; this the Lord Ordinary refused, but ordained the Earl by a writing under his hand, to answer certain interrogatories put to him. From his answers he admitted that a bond due to Lady Traquair's maid, was brought to this country in the same form as the one in question; that his trustees declined to acknowledge a debt in that form, but that, upon the Earl coming forward to substantiate it, the trustees paid it. It was also acknowledged by the Earl, that he had signed the present bond, as surety, but only on the most positive assurances given him, on the part of Strother and his agent, Kearney, that he should never be troubled for it, and that his signing the bond was a mere form. Upon these latter statements the whole case turned, and the Lord Ordinary was about to grant a commission to examine Strother and Kearney as to these facts, when the appellants agreed to make a reference to the oaths of Morgan, Strother, and Kearney, as above. This reference was allowed.

Before the commission was gone into, Kearney had died, and Morgan was abroad, and the respondents insisted that the commissioner ought to proceed with the examination of Strother. The commissioner declined this, and it appearing that there was no reference to the oath of Strother alone, he reported the matter to the Court. The Court saw no difficulty to the oath of Strother being taken under the reference, but the appellants argued that this was not what they had agreed to. It was to the oaths of Morgan, Strother, and Kearney as a whole, that had been referred to. The Lord Ordi-

Nov. 21, 1804.

nary thereupon decerned in terms of the conclusions of this libel. On reclaiming the petition, the Court pronounced

May 23 and 27, 1806.

this interlocutor: "The Lords recall the interlocutor of the "Lord Ordinary reclaimed against; repel the objection to "the constitution of the debt, and remit to the Lord Ordinary "to hear parties farther on the other branches of the cause;

"namely, how far the debt is due, or interest is exigible "thereupon, and to proceed and determine thereupon."

The case having come back to the Lord Ordinary, his Lordship, on considering the whole cause, pronounced this interlocutor: "Having considered the whole of this process, "and particularly the points remitted by the above interlo- "cutor of the Court; in respect that the objection to the con- "stitution of the debt is finally repelled by the Court; fur- "thur, in respect that the defender (the Earl), though only "the surety, is thereby subjected, conjunctly and severally, "with the principal debtor; and also in respect, that the "defender (the Earl), since the beginning of the cause to the "present time, has produced or condescended upon nothing "to instruct, either that the debt has been paid by the prin- "cipal debtor, or that the defender has been otherwise libe- "rated from payment of it, therefore finds the defender (the "Earl), liable for the principal sum libelled, and decerns; but "before answer as to interest, of which no mention is made "in the document, appoints the pursuers to state in a con- "descendence, the grounds on which they claim interest, and "when it should begin to run."

The appellants reclaimed, contending 1st, That no title had been adduced to this debt on the part of Morgan and Strother. The debt appeared to be due to Strother alone, and it did not appear by any assignation, or other right, to have been assigned to that Company. 2d, It being admitted that the principal debtor had not been discussed, the respondents were not entitled to come against the surety in the first instance. The obligants mentioned in the instrument, are "Don Andres "Fletcher, as principal debtor, and Don Charles Stewart, "Count de Traquhair, as his surety and principal payer." The appellant therefore being merely surety or cautioner for Fletcher, was entitled to plead the benefit of discussion, and could not be subjected to any legal demand, until it appeared that all diligence had been ineffectually used against the principal obligant. This is neither a joint obligation nor an obligation in which the privilege of discussion has been expressly renounced. Here the party is bound expressly as surety, which of itself entitles him to the benefit of discussion. The respondents answered as to the *beneficium ordinis*, that the terms of the bond sufficiently disposed of that point, that the appellant had bound himself "as surety "*and principal payer, though both of them jointly, and of one* "accord, and each of them separately," &c.

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BERRY, &c. v. STEWART, &c. Jan. 31, 1809. Feb. 1, 1809.

The Court adhered to the interlocutor complained of, of this date.

Against these interlocutors the present appeal was brought to the House of Lords; but, after hearing counsel, their Lordships were pleased to affirm the judgment of the Court of Session.

For the Appellants, *A. Gillies, D. Monypenny.*

For the Respondents, *John Dickson, Patrick Walker.*

NOTE.—Unreported in the Court of Session.

JOHN BERRY, of Inverdovat, and WILLIAM BERRY, W.S., - - - - - - *Appellants;*

ARCHIBALD CAMPBELL STEWART, of St Fort, and his Tutors, - - - - - *Respondents.*

House of Lords, 14th April 1815.

SALMON FISHING—RIGHT "CUM PISCATIONIBUS"—POSSESSION.—Held that the appellants had only a general right to fishings in the Frith of Tay, and that they had not proved forty years' possession of salmon fishing *ex adverso* of their lands, in order to entitle them to fish salmon under that title. Affirmed in the House of Lords. (2) Held that they were not entitled to erect a new quay and pier on their own lands, prejudicial to the right of salmon fishing in the respondents. Cause remitted as to the pier.

This action was raised about the right to fish salmon in the Frith of Tay, *ex adverso* of the lands of Inverdovat, belonging to the appellants.

The fishings to which the appellants laid claim were two in number. The eastmost one was called "Low Water Fishings," and the other was situated *ex adverso* of those portions of the lands of Inverdovat, called in the plan Well-gate, and in another place, "Welgate," and "Pluck the Crow."

The respondents, on the other hand, maintained that the appellants had shown no right to these fishings; and, further, that they were part of the fishings of Broadheugh, and of that marked "W. Gordon's fishings" on the plan, now belonging to the respondent, Mr Stewart.

But the appellants argued, 1. That there was a general right of salmon fishing annexed to their lands of Inverdovat,

and which, consequently, must give them a right to fish *ex adverso* of every portion of the same, except in so far as their general right is limited by special grants in favour of the respondent, and his authors; and, 2. That the fishings of Broadheugh, and the fishing marked "W. Gordon's fishings," belonging to the respondent, were limited in their nature, and did not comprehend those particular fishings claimed by the appellants. Besides, the appellants' right to make those operations on the quay of Newport harbour (which the respondent has been found entitled to prevent), is beyond all doubt, and did not interfere with the respondents' fishings.

The title-deeds of the appellants did not contain any grant from the Crown express of salmon fishing. Their titles contained only the general conveyance of fishings, but this, they contended, together with forty years' possession of salmon fishings *ex adverso* of their lands, was, in the law of Scotland, sufficient to entitle them to that right, where there was no express right of salmon fishing in favour of another. The Lord Ordinary ordered a proof of immemorial possession of fishing salmon opposite to their lands, on reporting which the Court pronounced this interlocutor: "The Lords having ad- June 30, 1810.
"vised the state of the conjoined processes, and heard parties'
"procurators in their own presence in the process of declara-
"tor, Find that the pursuer (John Berry) has instructed no
"right to the salmon fishings claimed by him; therefore sus-
"tain the defences, assoilzie the defenders from the conclu-
"sions of the summons and decern. And in the two pro-
"cesses of suspension and interdict, at the instance of Mr
"Berry, find the letters orderly proceeded and decern; find
"Mr Berry liable in expenses in the said process of declara-
"tor, and the said two processes of suspension, and that to
"both classes of defenders and chargers; appoint an account
"to be given in, and remit to the auditor to tax the same;
"but supersede extract," &c. The Court also, in the suspensions and interdict which had reference to the appellants erecting, on their own property, new quays or piers, opposite to Newport, and to prevent them from proceeding with these as injurious to the respondents' fishings of Broadheugh of same date, suspended the letters *simpliciter*. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought. July 6, 1810.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed, save so

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far as they relate to the erecting of the new pier at Newport harbour. And it is further ordered, that the cause be remitted to the Court of Session, to review the interlocutors, so far as they relate to such pier.

For the Appellants, *John Clerk, Jas. L'Amy.*

For the Respondents, *Sir Saml. Romilly, J. Moncrieff.*

NOTE.—Unreported in the Court of Session.

JOHN BAYNE, HUGH STEVENSON, The OBAN TAN WORK COMPANY, The OBAN BREWERY COMPANY, DONALD M'INTYRE, and Others, Feuars in the Village of Oban, - - - - - - - } *Appellants;*

DAVID CAMPBELL, of Combie, Esq., - *Respondent.*

House of Lords, 14th April 1815.

SUPERIOR AND VASSAL—FEU RIGHTS—GRAZINGS.—Feus having been granted by a common agent on the estate, with a right to grazing, in an action at the instance of the purchaser of the estate, these feu rights were reduced, in so far as they conferred privileges of grazing on particular lands, it appearing from the original bargain that these grazings were only to be let on lease, and not granted in feu, and therefore *ultra vires.*

An action of reduction was brought by the respondent, of the several feu charters granted by his authors, "in so far as "they severally contain grants in property of the privilege of "grazing horses and cows, or other bestial, upon the pasture "lands of the farm of Lower Glencrutten" granted in favour of the appellants.

In defence, the appellants, the feuars, stated the following circumstances:—That at a time when it was proposed to erect the village of Oban, by the then proprietor, Donald Campbell of Dunstaffnage, he advertised the lands of Glencrutten and Oban to be feued. It was only on his offering certain privileges and encouragements that the projected plan of feuing and erecting the town could succeed. Accordingly the appellants became feuars, each of them taking feus, and these feus were granted, with the privilege of grazing a number of horses and cows upon the lands of Lower Glencrutten. No missive letters or minutes had been drawn out or exchanged between them; and no charters or feu rights were

granted them at the time. They paid the purchase price, and received a written receipt from Dunstaffnage, for the same, whereupon they proceeded to erect their several buildings, being assured by Mr Campbell, that regular feu rights would be granted.

In 1794 the appellants became uneasy about not obtaining their charters, and urged their completion. The matter was already in the hands of Mr Allan M'Dougall, Mr Campbell of Dunstaffnage's, law-agent; and, being dilatory in the business, Mr Campbell addressed to him the following letter:—

"*Oban*, 13*th Dec.* 1794.

"DEAR SIR,—I have had a conversation with the feuars, "who are extremely anxious to have their charters, as they "consider themselves rather in an awkward situation till they "have them. You will therefore be so good as get the whole "of them extended without loss of time; and how soon they "are ready, send them by post, directed to me, at this place. "If the business of the session hurries you so much, as that you "cannot get them done immediately, the feuars are so urgent "to have them, that they wish, in that case, you to send the "drafts, *as corrected*, here, so that they may be extended in "the country; but this, for my part, I refer to you. At "sametime I am of opinion that sending the drafts will be "preferable; it being suggested by Mr Hugh Stevenson and "John Bayne that the boundaries and descriptions of the "different stances can be more correctly ascertained here "than from the plan; but the feuars don't mean by this to "deprive you of the fee payable by such. In that case, be "so good as send the vellum necessary; which, and the "drafts, *they* beg you will send as soon as possible, as above. "—I am, dear Sir,

(Signed) "DON. CAMPBELL."

It also appeared that, though the draft charters were revised by Mr Campbell himself, and by his agent, Mr M'Dougall, with the privilege of grazing above alluded to, set forth therein, yet Mr M'Dougall neglected, in terms of the above instructions, to extend and complete the charters before Mr Campbell's death, which happened early in the year 1795. His affairs were much involved. He had executed a trust-deed before his death, and the estate was sold by his creditors, a ranking and sale having been brought for that purpose. In the articles of roup there was a saving clause, "That the pur-"chaser of Lot 6, shall be bound and obliged to implement

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" *all minutes, missives,* and bargains betwixt the said deceased " Donald Campbell, and the persons who erected houses or " other buildings in the village of Oban."

It now became necessary for the feuars to attend to their interests. They demanded that the common agent should grant them the charters, who, on production of their receipts, and the revised feu charters prepared in Mr Campbell's lifetime, and other letters, showing the transaction, granted them the

June 28, 1804. charters in terms thereof, of this date, and they were infeft.

Sometime thereafter the estate was sold under express burden of the feu charters granted in favour of the appellants, as well as of the " Minutes, missives, and bargains between " the deceased Donald Campbell of Dunstaffnage, and those " persons who erected houses and buildings in the village of " Oban, in so far as the said minutes, missives, and bargains " were binding on the heirs and successors of the defunct."

The respondent then became purchaser at the public sale under these conditions; and his disposition contained an express exception from the warrandice of these feu charters.

But he contended that Mr Selkrig had no power to grant these feus, in so far as the grazings were concerned, and set forth facts which will be found in the Lord Ordinary's interlocutor.

Upon this, the Lord Ordinary pronounced this interlocutor:

June 14, 1809. " Finds that Mr Selkrig, as trustee for the creditors of Hay " Smith, the original purchaser of that part of the estate of " Dunstaffnage which was connected with the village of Oban, " had no power, and cannot be considered as having intended " to grant feus of other lands, or in other terms than those " agreed to by the late Donald Campbell of Dunstaffnage, as " pointed out in the decree of sale in favour of Hay Smith, " containing a clause, by which the purchaser was bound to " implement all minutes, missives, and bargains between the " deceased Donald Campbell, and the persons who have " erected houses, or other buildings in the village of Oban, " regarding such buildings, in so far as the said minutes, " missives, or bargains, are binding on the heirs of the said " defunct, as well as in a similar clause in the articles of roup, " on which the lands were purchased by the pursuer: Finds " that Mr Selkrig did not receive any additional price or " grassum, which could have entitled the defender to con- " ditions more favourable than those which had been proposed " and agreed on from the first: Finds, that by the original " memorandum drawn up by Dunstaffnage, two acres of

"arable land were let for nineteen years at an agreed rent, "with the houses that pay £20 entry money, and one acre "with each of the other houses without any mention of grass; "Finds, that by the missives with the defender, John Bayne, "31st August 1793, there are to be let in tack, six acres, for "the space of nineteen years, and grass for cows, conform to "the number of houses held in feu, for same space as the "above acres, at a reasonable rate yearly, and that by similar "missives with the defender, John Sinclair, two acres of "land are to be let for nineteen years, from Whitsunday "1792, at 17s. 6d. per acre, and grass for cows to be allowed "for the same period: Finds that the memorandums in favour "of the feuars have all, except two, been recovered, but in "none of them is anything stated with respect to perpetual "right to grass for cows: Finds that a memorandum holograph "of the late Mr Allan M'Dougall, agent for Dunstaffnage, "states that the grass for cows cannot be granted in feu, but "only in lease of the same endurance with the lease of the "lands, and that a circumflex appears upon the drafts of two "feu contracts, one proposed to be entered into with the "Oban Brewery Company in 1794, and the other with the "Tan Work Company, comprehending the clauses errone-"ously inserted in the view of conveying the grass lands as "part of the feus: Finds that the trustees of Captain Camp-"bell, younger of Dunstaffnage, declined subscribing a feu "contract, in which the grass land was given in feu, but "agreed to give a lease thereof for the same endurance with "the acres, conform to the original agreements: Lastly, "finds the defenders themselves, or some of them, when "examined as witnesses, in making up the judicial rent, de-"poned that the grass lands were to be held in lease. With "respect to the lands of Point included in the charter granted "by Mr Selkrig to the defender, Hugh Stevenson, finds that "it was not contained in any of the original minutes or me-"morandums, while that signed by Stevenson himself, com-"prehended only the stances of houses, and no other subject "whatever, and that the lands of Point are not mentioned in "the scroll feu-charters in 1794 or 1795, though this last was "in favour of the said Hugh Stevenson, who, on two different "occasions, namely, in a process of maills and duties against "Dunstaffnage, and in the proof in the process of sale, made "oath that he held said lands merely in lease: Finds that "the present challenge of the feu-charters granted by Mr "Selkrig, in so far as they go beyond the original bargains,

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" is not barred by the exceptions from the warrandice, either " in the articles of roup, or in the decreet of sale, sustains " the reasons of reduction: Finds that the feu-charters granted " to the defenders are effectual only with regard to the houses " and gardens, but ineffectual as to the grass lands, and as to " the lands of Point, and decerns."

On reclaiming petition, the Court adhered. And on second reclaiming petition, the Lords adhered.

These interlocutors having been brought by appeal to the House of Lords, their Lordships were pleased to affirm the same.

For the Appellants, *Wm. Adam*, *Ar. Fletcher*.

For the Respondents, *Sir Saml. Romilly*.

NOTE.—Unreported in the Court of Session.

(Reduction of Contract and Decreet Arbitral, &c.)

Major-General ROBERTSON of Lude, . . *Appellant;*

JOHN, DUKE OF ATHOLL, ... *Respondent.*

House of Lords, 20th April 1815.

REDUCTION—DECREE ARBITRAL—RELEVANCY.—A reduction was brought of a contract, a decree arbitral, judgment of the Court of Session, which pronounced in terms of the decree arbitral, and a judgment of the House of Lords. Held that no relevant grounds in law had been stated for reducing these.

The appellant's father, it was stated, had, previous to his death, and subsequent to the judgment in the House of Lords in the previous appeal in reference to the same subject of dispute (*vide ante*, vol. iv. p. 54), recovered some additional evidence, which, as was alleged, brought more distinctly to light the circumstances under which the deed or contract of 1716 was granted; and he was, therefore, advised to bring a new action of reduction of that deed or contract, and of the decreet arbitral following upon it in 1761, as well as of the judgments of the Court of Session and House of Lords pronounced thereon.

This action of reduction stated as reasons for so reducing these, *inter alia*, that " the said contract is not only unjust and " unfair in itself, but was brought about by *force* and *com-*

"*pulsion*, so as to be challengeable, *ex capite vis et metus*. "The said decree arbitral is not only unjust, but radically "defective, in respect the arbiter acted *ultra vires*, but the "decreet is in itself contradictory, unintelligible, and inex-"tricable."

The defences returned were in these words, "Seen and "returned with this defence, that no relevant reasons of re-"duction are libelled, and deny the libel."

This action, after the death of his father, was revived by the appellant, and after various procedure had, the Lord Ordinary pronounced this interlocutor: "Having advised these con- March 11, 1808. "joined processes, and considered what passed at a very full "hearing of counsel thereupon, and having heard nothing "stated, which appears to him to possess any aspect of rele-"vancy for reducing the decreet arbitral, 1761, which, under "the judgments of this Court, and of the House of Lords, "forms the rule of possession of the parties, with respect to "the matters in dispute, of new sustains the defences pleaded "for the defender in the original process of reduction, and "now again proponed in the conjoined processes; repels the "reasons of reduction, whether of the said decreet or of the "contract, 1716, or other rights recognized by it as valid, "refuses this representation, and assoilzies the defender; and "with respect to the declaratory conclusion in the new "summons, being of opinion that they are either ill-founded "in law, or adverse to the judgments above mentioned, pro-"ceeding on the present validity of the said decree arbitral, "assoilzies the defender therefrom, but without prejudice of "his enjoyment and possession of the subjects in question, "continuing to be regulated by the said judgments, and "subject to the same, and under this quality decerns; finds "the defender entitled to expenses, and remits the account Jan. 7, 1809. "thereof when put in to the auditor, and dispenses with any Feb. 2, 1809. Feb. 18, 1809. "representation, but supersedes extract during the vacation." June 20, 1809, and July 6, 1809. On reclaiming petitions being given in to the Court, the judges, adhered.

On appeal to the House of Lords, these interlocutors were affirmed with £100 of costs.

For the Appellant, *Sir Saml. Romilly, John Haggart, Duncan M'Farlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

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CALEDONIAN CANAL COMMISSIONERS v. GRANT.

The GOVERNMENT COMMISSIONERS for making the CALEDONIAN CANAL, . . *Appellants;*

COLONEL ALEXANDER GRANT of Redcastle, *Respondent.*

House of Lords, 28th April 1815.

CLAUSE—ACT—TAKING OF LANDS.—The Caledonian Canal Commissioners in their Acts for making the canal, had powers conferred upon them, to take stone, &c., from out the lands "of any "person or persons, adjacent, or lying convenient thereto." The respondent's quarry was five miles distant from the line of canal, and in a different county from those named in the Act. Held in the Court of Session that the Commissioners had *no* authority under the Statutes to take possession of this stone quarry, but, in respect of a prior agreement, held them entitled so to take the stone of that quarry. Affirmed in the House of Lords, excepting as to the Commissioners' powers under the Statute, which the House of Lords held it unnecessary to determine.

At the time the Caledonian Canal was projected, the Government Commissioners, for carrying on that undertaking, had entered into a private agreement with the respondent's predecessor, to allow them to take stone from his quarry of Redcastle, for the erection and purposes of the canal, "the "rate of remuneration to be determined by Provost Brown "of Elgin."

There were stone quarries of a finer quality nearer the line of canal than Redcastle quarry, which latter was situated at the distance of five miles from it.

Mr Brown, who had been appointed to fix the remuneration, from his connection with the Canal Commissioners, and in their active employment, and from feelings of delicacy, refrained from fixing the remuneration; and matters stood in this situation, when the respondent succeeded to the estate of Redcastle. At this time the Commissioners had been taking stone from the quarry for some few years.

Having succeeded to the estate, the respondent became anxious to have the remuneration fixed in some way, to the satisfaction of both parties. He therefore pressed that matter, whereupon the Commissioners brought forward their claims under their Acts of Parliament, which, they alleged, empowered them to take all such for the purposes of the canal, at sametime stating, that they were willing to allow him a rent of £40 per annum for the quarry. This was refused, as

perfectly inadequate, looking to the value and quality of stone in the quarry, and the respondent brought the present action. This action concluded, 1st, That it should be adjudged, that the Commissioners had no power under the Acts of Parliament, to take the respondent's property against his will, and that in future they should be held removeable at the pleasure of the respondent; 2d, That for their past possession the Commissioners should be held liable for an adequate rent.

The Act gave power to take the lands of any person or persons, and "bore, dig, cut, trench, get, remove, take, and "carry away earth, stone, cláy, soil, &c., in or out of the "lands or grounds of any person or persons *adjoining or lying* "*convenient thereto*, and which may be necessary or proper for "making," &c.

Upon this Act the Commissioners contended, 1st, That they had power to work the respondent's quarry for the uses of the canal, leaving it to be settled by a jury to what damages he should be entitled. 2d, They contended that the words of the Act were not ambiguous, that in the examination of the powers bestowed on them, that of digging and working *stone* was expressly mentioned, and that, instead of being confined to the direct limits of the canal, their powers were extended to all places and materials lying *adjoining* and *convenient* to the canal. 3d, That the agreement with the late Mr Grant was an acknowledgment of this right; and 4th, That the limitation of actions in the Acts was a bar to the present action.

In answer, the respondent contended, 1st, That the powers of the Commissioners to take lands, &c., for the purposes of the Act, was confined to a particular line, with the single exception of going five thousand yards for supplying the same with water, and making the necessary works therefor. And there was a clause in the Act which seemed to remove all doubt on the subject, which set forth that "the Commis-"sioners in making the said navigation, shall not deviate "more than 150 yards from the course or direction delineated "in the said maps or plans, without the approbation or con-"sent of the person or persons to whom the lands, grounds, "or heritages so be cut through or made use of for the pur-"poses of such deviation, shall belong." 2d, That the sections provide for fixing the value of lands taken for digging out the harbour at Beauly, building quays, warehouses, &c., but do not extend the remedy, or apply to a quarry at the distance of five miles, and situated in another county. 3d, That they

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were not empowered to take stone from all quarries *convenient*. 4th, That from the description in the Act of the *object*, it appeared that the operations were limited to the counties of Inverness and Argyll, and, therefore, it was plain that the legislature never meant to include property in the county of Ross, where the quarry in dispute is situated.

July 2, 1811. The Lord Ordinary (Meadowbank) reported the case to the Court, and the Court pronounced this interlocutor: "On "report of Lord Meadowbank, the Lords find in terms of the "first conclusion of the libel, that the Commissioners, or "others in their employ, had no power or authority under "the statutes founded on, to take possession of the said stone "quarry of Redcastle, situated in the county of Ross, without "the consent of the proprietor; but in respect that the late "proprietor of Redcastle had consented to the defenders and "those employed by them, possessing and working the said "quarry, which they have accordingly done for several years, "and on the faith of being continued in possession so long as "requisite for the construction of the said canal, basins, and "appendages, the Commissioners had, with the knowledge and "approbation of the proprietor, laid out large sums of money "in building a pier, improving the quarry, and other works "connected with it, whereby matters are not now entire: "Therefore sustain the defences as to the removing, assoilzie "the defenders from that conclusion of the libel, and decern: "Find that the defenders are liable to the pursuer for ade-"quate damages, rent, and compensation for the said quarry, "and remit to the Lord Ordinary to hear counsel for the "parties as to the mode of fixing the amount, and to proceed "farther in the cause as his Lordship shall see just; super-"sede extract till the first box-day at the ensuing vacation."

Feb. 12, 1812. On reclaiming petition by the appellants (the respondent having acquiesced), the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Even though the powers of the appellants to take stones from the quarry of Redcastle were doubtful, such doubt was removed by the agreement which the appellants made with the respondent's predecessor, pursuant to the Acts of Parliament, passed for constructing the harbours. The appellants might have purchased from the proprietor of Redcastle, stones worked by the proprietor himself, but they could enter upon, and work the quarry themselves only by virtue of the powers given to them by

that or the subsequent Act of Parliament, and they could not have been justified in expending £2000, to enable them to work the quarry, if they had not proceeded upon such powers, which were admitted by the former proprietor of Redcastle, and could not now be challenged by his successor, who was bound by his acts and deeds. 2d, But, even if the power still rested solely upon the words of either Act of Parliament, there was no doubt, according to their right construction, that the appellants thereby received power to work the quarry in question. By the first Act of Parliament above set forth, the appellants were to construct one harbour in Loch Beauly, near to the town of Inverness, and another harbour to the west of Fort William, at the mouth of the river Lochy. By the second Act of Parliament, they were to maintain a navigation between the two harbours. By the first Act they were not only empowered to take and carry away stone, but also to dig, cut, get, and remove, earth and stone, "in or out of "the lands or grounds of any person or persons adjoining "*or lying convenient thereto*, and which may be necessary, "requisite, or proper, for making, carrying on, or repairing "any of the said works."

By the second Act they received similar powers with reference to the navigation. The quarry of Redcastle is situated upon the shore of Loch Beauly, and was the most eligible resort for stone, because it was "*lying convenient thereto.*" Being thus situated on the very shore of the Loch on which the harbour was to be constructed, it was impossible to contend that it did not lie most "*convenient thereto*," and convenient to the operations which they were to carry on. The standing orders of the House as to notice, have nothing to do with the construction of an Act of Parliament, nor can the fact of the respondent's property being situated in the county of Ross, any way affect the question. 3d, Where, as in the present instance, peculiar powers are granted and a peculiar remedy provided, it follows that no other remedy can be had but the remedy so provided. And as the Act provides that no action shall be competent "after six months" after the act committed, the present action is incompetent.

Pleaded for the Respondent.—1st, There is no question here, whether the public are to be deprived of the benefit of the quarry. In the use of it, uncontrolled by the respondent, they are secured by the judgment acquiesced in, which holds the respondent bound, as on the footing of a solemn contract, to allow the commissioners the use of the quarry, "so long as

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"requisite for the construction of the canal, basins, and appendages." The only question, therefore, is, how the recompense shall be settled? The respondent apprehends that, on the footing of a contract, the matter is left for the decision of the Court of Equity *secundum arbitrium boni viri;* and he is the more solicitous for this, that there is a distinction settled in practice, if not recognized in law, between the ascertainment of *damages*, and settling of *recompense*. The former, in cases like the present, are generally limited by a jury for the injury done to the surface, by the removal of earth and other materials of no intrinsic value; the latter is more properly applicable to the case of an agreement for the sale or lease of materials in themselves intrinsically valuable; 2d, To interfere with private property, and especially to confer on any set of persons, whether private undertakers, or trustees for the public, an authority forcibly to seize it, leaving the proprietor to a legal process for having his damages assessed, is always a dangerous and extraordinary power. And in no case does Parliament ever assume it, but under the pressure of absolute necessity, and with the most careful and strict precautions to secure due notice to the persons interested. Without such notice the most valuable rights of individuals may be injured; not only property of value taken without an adequate object, but contracts depending on the preservation of that property outraged, and individuals ruined past redress, or perhaps even the execution of other public works of still greater importance prevented. It is upon such views, that the standing orders of the House of Commons, requiring notices to be given of all such bills, are grounded. They are intended to secure, against the possibility of such extraordinary powers being delegated without those who may be interested in their execution, having a full opportunity of being heard against the bill. But this principle and those rules are, in this case, outraged in fact, much more in argument, if the doctrine contended for by the appellants is to be admitted. The bill applies only to the two counties of *Inverness* and *Argyll*, and the requisite precautions were of course taken to give notice only to the proprietors of those counties. But the respondent's estate is in the county of Ross, and neither directly nor indirectly had the proprietor of that estate notice of the powers, under which, it is now said, he is liable to encroachment. 3d, This quarry lies at the distance of between five and six miles from the canal, and neither are there *express* words in the Acts, nor any construction deducible from the

practice of Parliament, and applicable to the *general* expressions made use of, which can be held to confer a power beyond the mere line of the canal, and the lands adjacent. The general expressions are to take earth and stone, &c., from the lands and grounds of persons *adjoining or lying convenient to the canal*, which cannot apply to this quarry, at so great a distance, and across a frith.

In the Crinan Canal Bill, in the Forth and Clyde Canal Bill, in the Leith Harbour Bill, and in the Peterhead Harbour Bill (where an extension of this power to dig the rude materials, happened, from the nature of the ground, to be necessary) it was only by an *express* declaration of such given power, to be exercised within an extent of so many miles from the line of operations that such was allowed. And even in the Acts now in question, there is one particular case, in which a similar extension of power is conferred, viz., for the purpose of taking in the necessary streams, and for accomplishing the requisite buildings for that purpose; to that effect, power is given to the extent of 5000 yards from the line of canal. And no power being given of a similar nature as to the taking of earth and stone, the appellants cannot take land or stone quarries five miles distant from the canal and situated in a different county. 4th, The provisions of the Act for giving a remedy to those persons whose property shall be taken, is not within the reach of the respondent; powers being given only to empannel juries in the counties of Inverness and Argyll, and there being no authority whatever to the Sheriff of Ross to take such proceedings under the Statute.

After hearing counsel,

It was declared by the Lords, That it is unnecessary in this case to determine whether the appellants had power or authority, under the Statutes founded on, to take possession of the stone quarry of Redcastle without the consent of the proprietor; and it is therefore ordered and adjudged, that the said petition and appeal be dismissed this House, and that the rest of the interlocutors therein complained of be, and the same are hereby affirmed.

For Appellants, *Thos. Plumer and Dav. Monypenny.*

For Respondent, *Sir Saml. Romilly, Geo. Jos. Bell, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

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ROBERTSON v. THE DUKE OF ATHOLL, &c.

(Clunes and Strathgroy.)

Major-General Wm. Robertson of Lude, . *Appellant;*

John, Duke of Atholl, and John Stewart, *Respondents.*

House of Lords, 10th May 1815.

Title to Exclude—Prescription.—A Crown charter and sasine following thereon held a sufficient title to exclude an action of reduction, improbation, and declarator of lands which had belonged at one time to the appellant's predecessor.

A reduction, improbation, and declarator was brought by the appellant against the respondents, to have it found that the lands of Clunes, and the lands of Strathgroy, which had belonged to the appellant's predecessor, and which were now possessed by the respondents, belonged to the appellant, and calling for the production of all writings, charters, and titles, upon which the respondents founded their right to the same.

The Duke of Atholl alone appeared. He satisfied the production, and produced a Crown charter, dated March 6, 1691, and instrument of sasine thereon, and upon this he pleaded a prescriptive title, so as to exclude the present action.

June 18, 1805. The Lord Ordinary, of this date, "Finds the defender has "produced sufficient evidence to exclude, therefore dismisses "the process, and decerns;" and the Court, upon two several reclaiming petitions, adhered with expenses.

Feb. 16, 1809. May 17, 1809. On appeal to the House of Lords these interlocutors were affirmed.

For the Appellant, *Sir Saml. Romilly, J. Haggart, D. Macfarlane.*

For the Respondents, *William Adam, Ar. Fletcher.*

Note.—Another appeal, brought by the same party, against the Duke in regard to the lands of Inchmagrenoch, was decided at the same time, involving the same point of law (title to exclude).

[Fac. Coll., Vol. xvi., p. 304.]

ALEXANDER and JAMES CRAIGIE, late tenants of Little Fardle, in the County of Perth, ... } *Appellants;*

SIR ALEXANDER MUIR MACKENZIE of Delvine, Bart., ... *Respondent.*

House of Lords, 12th May 1815.

LEASE—LANDLORD AND TENANT—DEVIATION FROM MODE OF CROPPING—OPTION—PENALTY.—An interdict was brought by the landlord against the tenant, to prohibit him from ploughing and cropping the farm in violation of the mode of cropping laid down in the lease. The lease provided that the tenant was to keep the fourth part of the farm, yearly, either in hay or pasture, or to pay an additional rent over and above the year's rent, and the tenant contended that this gave him an option to deviate on paying the additional rent. Held the clause prohibitive, and not alternative in its nature, and therefore that the tenant had no option to deviate on paying the additional rent. Affirmed in the House of Lords.

A petition and interdict was brought against the appellants, as tenants of the respondent, before the sheriff, to have them inhibited and discharged from ploughing and cropping the farm in violation of the particular course of husbandry laid down by the lease.

The lease was in the following terms:—"All and whole "the town and lands of Little Fardle, with the whole privi- "leges and pertinents of the same, as then possessed by "George Stirton and James Williamson, lying in the parish "of Caputh and shire of Perth,"—"and that for the space of "nineteen years from and after their entry thereto, at the "term of Whitsunday 1791 years, as to the houses, yards, "and grass, and after separation of crop 1791 years from the "ground as to the arable and laboured land; declaring "always that the island lately formed by the Tay on said "possession, and the Horn Haugh, are to be constantly kept "in pasture grass, and no part of them in tillage."

This lease had the following clause; that "the said tenants "and their foresaids hereby become bound to keep, regularly "and constantly, after the first five years following their "entry to the said farm, a fourth part of the arable part of "the said farm either in hay or pasture, or an additional "rent of forty shillings sterling to be paid by them to the

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" proprietor, over and above the current rent for each acre of " said fourth part of their farm they shall neglect to keep in " grass as above specified."

The tenants did not deny the clause, but the interpretation they put upon it was that they had the option of ploughing this fourth part also, *on paying the additional rent.*

The sheriff pronounced the following interlocutor: "Having considered the pursuer's petition, with the answers and " replies, and tack produced, and paid attention to the different clauses in the tack, and the admitted meaning of the " parties at the time it was entered into, and the great difference of things now: Finds that the defenders (appellants) " must this year have a fourth part of their arable ground in " hay or in pasture grass, and inhibits and discharges them " from breaking up or cropping those parts of the farm which " were last year in hay or pasture grass, in so far as the doing " so will diminish the said fourth part; but of consent of the " pursuer, finds the defenders entitled to consider that part of " the farm received in exchange from the estate of Lethendy " as part of the fourth so to be let in pasture or hay, on this " condition only, that the part so exchanged shall not this " year be ploughed, or the sward broke up, and on this " branch of the cause decerns; declaring the interdict perpetual. And further, inhibits and discharges the defenders " from ploughing or breaking any part of the sward of the " island and Horn Haugh referred to in the tack, or any " other part of the farm which has not been ploughed and " cropped at any time during the currency of the tack, and " particularly the sward grass close by the river. And further, " as the pursuer charges the defenders with infringing the " clauses of their tack in time past, finds it necessary and " tending to save expense to the parties, that the farm should " be immediately inspected, and a bird's-eye sketch of it produced, showing how it is at present laid out, or how it was " laid out in crop last season, in so far as that can be discovered " by the eye, and how, from the present appearance it is likely " to be cropped for the present season. And with that view " appoints David Buist, land-surveyor in Perth, to make such " inspection and report, and appoints him likewise to measure " that part of the arable ground now in grass, and the grass " ground received from the estate of Lethendy, and assigns " the day of for him to make his report."

This judgment was brought under the review of the Court of Session by bill of advocation. The Lord Ordinary ordered

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the case to be stated in memorials to be reported to the Court; and these having been given in and reported, the Court were equally divided. It went back to the Lord Ordinary, and he refused the bill; and on reclaiming petition, the Court finally came to adhere to the interlocutors complained against.*

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, *The legal meaning and construction* of the particular clause in leases on which the respondent founded his application for an interdict, is now finally and unalterably fixed. It has been long settled in the law and practice both of Scotland and England, that a condition in leases, expressed as this is, resolves into an alternative contract,' in which the tenant has an option to deviate from the course of cropping prescribed in the lease on paying the higher rent, and there is no specialty in this case to subject the agreement between the appellants and respondent to a different interpretation.

2d, The various precedents of decided cases, declaring such clauses to be alternative agreements, and to give the tenant an option to adopt the course of husbandry that he thinks most expedient, are strictly consistent with the general principles of law recognized in all cases of alternative contract.

Rolfe v. Peterson, 2 Vernon, p. 119; *et* 2 Bro., P. C. 436. Pollock v. Paton, July 24, 1777; Mor. 15262. Graham v. Straiton, *vide ante*, vol. iii., p. 119. Henderson v. Maxwell, Feb. 24, 1802; Fac. Coll., vol. xiii., p. 49. Wortley v. Batley, 1808; unreported.

3rd, There are the strongest grounds in expediency for adhering to former decisions upon such clauses as the present. The additional sums stipulated in such cases must inevitably be found either to be penalties or conventional rents, entitling the tenants, on payment of them, to reject the landlord's and adopt their own course of husbandry. But it is the obvious interest both of landlord and tenant, that the additional rent should be viewed as a *penalty*.

4th, The argument of the respondent has no foundation in law; and in particular his distinction between general and specific penalties, is novel in itself, and unsupported by a single authority in the law of Scotland, or of any other system, and at any rate the penalty in this peculiar case is provided in *another* clause of the lease.

Pleaded for the Respondent.—Though the meaning of the parties in any covenant must depend, not merely upon the terms of that covenant, but upon the whole of the contract entered into between them with reference to its subject mat-

* The majority of the judges construed the clause in the lease as *prohibitive* and not *alternative*.

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ter; and though upon the just construction of the lease in the present case, very few words might be necessary to show that the respondent was entitled, upon the covenants therein contained, to restrain the appellants from breaking up the grass ground in question, yet as the appellants endeavoured to support their right to break it up, by reason that the penalty in the present case was a specific penalty, it may be necessary to show that the enforcing an obligation by a specific penalty, does not give an option to perform the obligation, or to pay the penalty.

When it first became the fashion in Scotland for landlords to prescribe a certain course of husbandry to their tenants, the observance of the rules laid down, was usually enforced by means of a general penalty at the end of the lease; for example, £100 sterling or a year's rent over and above performance; but in equity, penalties of this nature are subject to modification, that is to say, they are restricted to the actual damage that can be qualified. For some years past, therefore, it has been the custom to stipulate a specific instead of a general penalty, the tenant becoming bound to pay an additional sum per acre, for every acre which is not managed in the method prescribed. But a specific penalty, in other words, a liquidation of damage made by the parties themselves beforehand, is not subject to restriction like a *general penalty*. The object, however, was not thereby altered; it was still only a means of enforcing performance of the covenant of which it formed a part; and was sufficient for its purpose, so long as the loss to result from the infringement was greater than the profit to be gained by it; in point of fact, in the present case, it was sufficient for its purpose, until the last year of the lease.

Chilliner *v.* Chilliner. Earl of Wemyss *v.* Skirving, 1809; Fac. Coll., vol. xix., p. 8. Mackenzie *v.* Batley, 1810 (unreported). Mackenzie *v.* Gilchrist, Dec. 13, 1811; Fac. Coll., vol. xvi., p. 419.

Accordingly, the decisions on this point in England and Scotland go to support this view, *vide* Lord Hardwicke's decision, reported in Vesey, 2d vol., p. 528; and in Scotland, the late decision of the Earl of Wemyss *v.* Skirving, as well as the judgment pronounced in the case of the Honourable Mr Wortley Mackenzie of Belmont *v.* Stewart Mackenzie Bately; which decision was confirmed by the case of Mackenzie *v.* Gilchrist, in the following year, holding that the "tenant was not entitled to contravene the stipulation by "which he is bound to leave one-third part of the farm in "grass, even upon offering to make payment of the additional "rent stipulated by way of penalty."

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Sir Saml. Romilly, John Cuninghame.*

For the Respondent, *Geo. Cranstoun, James Keay.*

SIR WILLIAM CUNINGHAM FAIRLIE, Bart., *Appellant;*

Dame MARIANNE CAMPBELL or CUNINGHAM FAIRLIE, . . . *Respondent.*

House of Lords, 3d July 1815.

DIVORCE FOR ADULTERY—REMISSIO INJURIÆ.—The plea of *remissio injuriæ* was sustained by the Court of Session, but in the House of Lords the case was remitted for reconsideration, with considerable doubts expressed as to the judgment below, in consequence of there being no evidence that the husband had probable knowledge of his wife's guilt at the time of the alleged condonation.

This was an action of divorce brought by the appellant against the respondent for adultery committed by the latter, in which the special defence of *remissio injuriæ* was stated by the respondent as a bar to the action.

The appellant, in regard to this defence, stated that, at the time alluded to, when he forgave the respondent, he knew nothing of any act of adultery having been committed. Certain rumours and hints led him to inquire, and he found that they all ended in certain familiarities with a young man of the name of Begbie, who resided in the house, but did not amount to guilt, such as could found a divorce. And having charged her with these, it led her to protestations of innocence, which reconciled him to her at the time. Afterwards, however, having received two letters from Major Brown, in regard to her conduct, which he opened in her presence, and on reading them, discovered his uneasiness, such as led her to be anxious to know their contents. Accordingly, that very night, or early next morning, he found that she had taken these two letters out of his pocket, and had gone to Begbie's bedroom, where he found her reading to him (Begbie) the two letters which he had received about her conduct with him. He left the house on this occasion, and on her entreaties again returned, and slept with her again. Afterwards, however, he received

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further information through a Major Woodgate, in the end of January 1809, which made him determine to institute a full inquiry. On the 12th of February he slept with her, but had then no actual knowledge of her guilt. Thereafter he separated himself from her, and raised his action of divorce for alleged acts of adultery committed with Begbie, in the years 1806, 1807, and 1808.

The commissaries were unanimous in holding that the defence of *remissio injuriæ* was not made out after his actual knowledge of her criminality. But this judgment having been brought under the review of the Court of Session, the Court finally, of this date, remitted to the commissaries "to "sustain the defence of *remissio injuriæ*, but supersede extract "till the first box-day in the ensuing vacation." *

Mar. 5, 1812.

From this interlocutor of the First Division of the Court the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, While the respondent set up the defence of *remissio injuriæ*, she contended that the facts condescended on by the appellant, were not founded on fact; but the defence of *remissio injuriæ* was not competent, except upon the ground that the appellant was cognizant of certain facts inferring the criminality of the respondent, and being so cognizant, renewed his marital intercourse with her. 2d, The greater part of the facts condescended on by the appellant, became known to him in consequence of the investigation which he set on foot, as to the conduct of the

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* Opinions of the judges:—

By previous interlocutors, the Lord Ordinary and the Court had come to an opposite conclusion; and at this advising,

LORD PRESIDENT HOPE said,—"I think the circumstances of *remissio injuriæ* as strong here as in the case of Hutchison, where the defence of remission was sustained."

Hutchison v. Hutchison, Mar. 11, 1808 (unreported). *Vide* Frazer's Domestic Relations, vol. i., p. 667.

LORD BALMUTO.—"The difference between the two cases is, that Hutchison knew and was thoroughly informed of the adulteries, and had actually commenced his process of divorce. But in this case, all was in a state of *suspicion* and *investigation* only. There were no doubt strong grounds of suspicion; but this did not just amount to certain conviction, at least in his mind; and my view was, that it would require something very strong to tie a man for life to such a woman as this."

A majority were for refusing on that ground.

But on another advising (March 1812), the Lords altered and sustained the defence.

Hume's Collection, Session Papers, vol. 114.

respondent, subsequent to his final separation from her. And the respondent has totally failed to prove that the appellant was acquainted with the circumstances, inferring the criminality of the respondent, on which to found an action of divorce, before he entirely separated himself from her society. Before that occurred, there was nothing but suspicion.

Pleaded for the Respondent.—The appellant's mind was made up in the month of January 1809 or in the beginning of February, for it was towards the end of January that the visit to Bath began, in the course of which, he determined to separate from his wife for ever. He had communicated this determination to Mr James Cuningham; had directed him to get separate lodgings for his wife. These directions had been complied with, and the lodgings actually seen and approved of by the appellant on the 11th of February. Now he admits in his judicial declaration, that he slept with the defender on his return from Tunbridge Castle on the night of Sunday the 12th of February. Yet so capricious and unfair was his conduct, that on the 13th, being the very day in which he had left her room, he wrote the letter which he gave to Mr James Cuningham, and which is misdated the 14th, and falsely dated from Stilton. The cohabitation between the night of the 12th and 13th, is conclusive against the appellant. These facts are proved by his judicial declaration and the testimony of Mr James Cuningham. The declaration acknowledges the cohabitation upon the 12th; the condescendence states, that on the 14th, the appellant wrote to the respondent that he never meant to see her more, and of course the resolution must have been adopted for sometime before he wrote. The appellant attempts to explain away all those circumstances by pretending they were resorted to merely for the purpose of facilitating *investigation*, and there is no doubt that this word was used. But it is a very equivocal expression; for in one sense, the separation which at this moment subsists between the parties, as well as the whole procedure under the action of divorce, may be said to have taken place for the same end. It is not necessary for the respondent's plea that she prove the appellant to have been so convinced, and his evidence so prepared, that he required to make no further inquiry, before he demanded a divorce. It is enough for her to show that he heard and believed the existence of the injury which he afterwards forgave. The appellant's conduct, therefore, amounted to that *remissio injuriæ*, which is sufficient, by the law of Scot-

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land, to bar an action of divorce at the instance of the party who has forgiven the injury he complains of.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,*

"There was a cause heard sometime ago, in which Sir William Cuningham Fairlie was appellant, and Dame Marianne Cuningham Fairlie, his wife, was the respondent. This arose from a divorce which the appellant, Sir William Cuningham Fairlie, endeavoured to enforce by an action in the Court of Commissaries of Edinburgh. It appears that these parties were married in November 1790, and, as the appellant states, in the years 1806, 1807, and 1808, the parties resided at different places in England. My Lords, in 1806, it will be in your Lordships' recollection that the intimacy and supposed criminality of James Begbie with Lady Cuningham have been the subject of a great deal of discussion in the papers and at your lordships' bar. It certainly appears that Sir William C. Fairlie entertained considerable suspicions as to the chastity and purity of his wife's conduct; an examination was instituted into the grounds of those suspicions upon more occasions than one, and at length Sir William Cuningham Fairlie was so well satisfied of the fact in his own mind, that Lady Cuningham Fairlie had committed an act of adultery, that he instituted this action of divorce.

The respondent gave in her defences, and in her defences she denied the truth of the charge.

My lords, on the 26th of January 1810, the Commissaries pronounced this interlocutor:—"The Commissaries having considered "the libel, execution, defences, answers, condescendence for the "pursuer, answers thereto and replies, and pursuer's oath of "calumny, before further procedure, ordain the pursuer to give "in a more articulate condescendence, and therein to state when "he was first informed of or had reason to believe the criminal in-"tercourse of the defender with James Begbie, mentioned in the "process." In consequence of this interlocutor, the appellant lodged another condescendence to which the respondent answered, and then the Commissaries, on the 16th of March 1810, pronounced a second interlocutor in which they "ordained the pursuer "to give in an additional condescendence, and therein to state "much more specifically the times when the different criminal "acts alluded to in the first, second, and third articles of the "condescendence, are alleged to have taken place, and to allow "the defender to see and answer the said additional condescen-

* From Mr Gurney's Short-hand Notes.

"dence when given in." This was accordingly given in, and further answers, and then the Court pronounced another interlocutor on the 22d June 1810, allowing the pursuer a proof of the facts stated in his additional condescendence, and the defender a conjunct probation anent the premises, and granted diligence in the usual terms. This interlocutor was again brought under the review of the Court by the respondent, but the Commissaries refused her petition without answer. She then presented a second reclaiming petition, and she insisted that the action was cut off by a *remissio injuriæ*, in other words, that the offence complained of by the husband, had been cut off by *condonation*. Upon this the Commissaries, who are very much in the habit of considering these matters by the law which regulates these concerns in Scotland, on the 14th September 1810, "ordained the pursuer to "appear in Court and undergo a judicial examination with "regard to the facts stated in the petition." The appellant was, accordingly, judicially examined, and, on the 12th of October 1810, the Court pronounced this interlocutor:—"The Commis-"saries having resumed consideration of this cause, find that the "pursuer's declaration does not instruct the defence of *remissio* "*injuriæ* pleaded by the defender; therefore ordain her to give "in a special and articulate condescendence of the facts she will "undertake to prove in support thereof;" which condescendence having been given in, and the appellant having answered, the Commissaries pronounced a further interlocutor of the 23d of August 1811, by which they state that, "having considered the "proof adduced by the defender, and whole process, repel the "defence of *remissio injuriæ*, allow the pursuer a proof of the facts "stated in his libel and condescendence, and of all facts and cir-"cumstances tending to support the conclusions of his action; "allow the defender a conjunct probation anent the premises, and "grant diligence *hinc inde*." Against this interlocutor also, the respondent reclaimed, and the appellant having made answers, the Commissaries, on the 26th of November 1811, pronounced this interlocutor:—"The Commissaries having considered this "petition with the answers, refuse the desire of the petition, "and adhere to the interlocutor of the 23d of August last; appoint "the pursuer's proof to proceed on Friday three weeks after "the Court; but allow the defender, if so advised, to apply by "bill of advocation, in the meantime, complaining of the judgment "of the Commissaries, repelling the plea of *remissio*."

Your lordships, therefore, perceive that, upon three occasions, as I understand these proceedings, the judges in the Commissary Court were of opinion that there was nothing before them sustaining this defence of a *remissio injuriæ*, which should repel the right of the appellant to enter into proof of the facts of adultery, which he alleged, but at the same time the Commissaries seem

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to have thought this was a case of some peculiarity and some difficulty, and they therefore qualified the last interlocutor by allowing the defender "to apply by bill of advocation, in the "meantime, complaining of the judgment of the Commissaries "repelling the plea of *remissio*." The matter was accordingly in due form advocated to the Court of Session, to which the appellant made answers, and the Lord Ordinary, on the 26th of January 1812, having considered the answers and proceedings before the Commissaries refused the bill.

The respondent then presented a reclaiming petition, which the Court directed to be answered, and answers having been given in, the Court on the 29th of January 1812, by a majority of their number, pronounced this interlocutor:—"The "lords having heard this petition, they refuse the prayer of it, "and they adhere to the interlocutor of the Lord Ordinary re-"claimed against, and sist process for ten days, that the petitioner "may reclaim if she shall see cause." Here are, therefore, my lords, two judgments, one of the Lord Ordinary, and the other of the first division of the Court of Session, acceding to three judgments of the Commissary Court—so far the interlocutors all agree. The respondent then presented a second reclaiming petition which the Court directed to be answered, and answers having been given in, the Court, on the 5th of March, by a majority of their number (all of them, I think, stating themselves to have great difficulty, and if I may be permitted with infinite respect to say so, perhaps mistaking the case in some views that may be taken of it with respect more to other considerations than whether this defence of *remissio injuriæ* should be admitted), pronounced this

Mar. 5, 1812.

interlocutor:—"The lords having resumed consideration of this "petition, and advised the same with the answers thereto, they "alter their former interlocutor, and remit to the Commissaries "with instructions to sustain the defence of *remissio injuriæ*," and from this last interlocutor of the Court of the 5th of March 1812, this appeal is brought.

My lords, the result seems to be this, that the Commissary Court were of opinion that this plea of *remissio injuriæ* was not a plea on which they should act, or at least on which they should act to the extent of holding Lady Cuningham Fairlie acquitted of the fact of adultery, the Lord Ordinary thought so, and the first division of the Court seem to have been almost all of the same opinion on the first occasion when this matter was brought before them, but on its being brought before them for further consideration, the majority were of opinion that this *remissio injuriæ* was a sufficient answer to the adultery, even supposing the adultery to have been committed. My lords, I have observed in such memoranda as we have of the judges' opinions (being very loose notes, and notes in general so loose that I am afraid on many

occasions they would not do justice to the grounds of opinion which are expressed), several passages intimating that it is a matter quite out of the question, that Sir W. Cuningham Fairlie should ever obtain a divorce, that his conduct has been so inattentive, so negligent, as that, perhaps, intending so to do, or at all events, if he did not intend so to do, yet from the operation of negligence and inattention, he has given so much encouragement to this conduct of his wife, that he could not be expected to sustain an action for considerable damages, if any damages, and that he could not be considered as entitled to sustain his demand for a divorce. Your lordships will permit me to say that we are going too far forward in this case, if we take upon ourselves to say whether Sir W. C. Fairlie will ever obtain damages; for the real point before the Court of the Commissaries as well as the Division of the Court of Session, is not what judgment should be pronounced under all the circumstances of this case, if Sir W. C. Fairlie shall make out that his wife has committed an act of adultery, and she, on the other hand, shall not establish that there has been a *remissio injuriæ*—admitting it to be a *remissio injuriæ*, —I conceive we are going too far forward if we are undertaking to say now, whether, in the result of the cause put upon that point, Sir W. C. Fairlie will be entitled to have the sentence of the Court in his favour; the question before us now appears to me to be this, and to have been this before the Commissaries and the Court of Session, whether, attending to the state of the pleadings, and attending to the conduct and declarations of Sir W. C. Fairlie, according to the form in the court of the Commissaries and the Court of Session, the wife having positively and solemnly denied, in her pleadings and in her correspondence, according to the evidence which is given, that she ever was guilty of adultery, it be competent for her to say, I never did inflict this injury upon my husband, and if I have, he has forgiven it. It is very difficult to make out that a person can forgive that injury which he has never sustained. I do not mean to deny, that in a case of this nature, if it could be made out clearly and decidedly, that the husband believed that the wife was guilty of the adultery, and afterwards acted towards her as he would have acted to her if she had been always innocent, that plea might not be maintained in our Ecclesiastical Courts, or in the Commissary Courts in Scotland and the Court of Session, that is to say, if the adultery being proved by clear and decisive evidence to have been committed, he chooses to say, 'Well, though I am satisfied you have been guilty of adultery, I will forgive it,' either by express words or by such conduct towards her as imports that he has forgiven it, but I think that your lordships will feel it as one of the most difficult questions that can occur, with respect to proof, for you to say, what evidence you will admit to be sufficient, that the husband did

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believe it. There are many cases where a husband would make but little way in an action of damages where you can prove there has been negligence, or in a bill of divorce here, where there was that negligence and that inattention, and yet it may be extremely difficult to say that, because a man has been negligent, and because a man has been inattentive, therefore he believed his wife was guilty of adultery; negligence and inattention may be circumstances to furnish such an inference, but it depends much upon the temper of men, upon the understandings of different persons, and their minds and passions. One man does what another does not on such a subject, so much so, that I apprehend before you can, on a plea of *remissio injuriæ*, permit the party to go on to prove there was adultery committed, you ought to have some evidence, pregnant with proof, tending to the conviction, that he actually did believe that she had been guilty of adultery, before you shall say that the subsequent declarations and subsequent conduct amounts to that defence.

"My lords, I do not mean to say there is not some evidence of that sort here. There is some evidence of that sort, contradicted, however, by other evidence applying to that which was said, to which the former evidence referred, and therefore bringing into evidence the declarations, if they were unquestionably true, but they do not appear to be declarations on which the Court of Session proceeded.

"My lords, it is laid down in all the books, and particularly by Burn, an author of great weight with respect to ecclesiastical doctrine, and with respect to divorce: "If the party accused "shall prove that the accuser, before the commencement of the "suit, had probable knowledge of the crime committed, and yet "afterwards had carnal intercourse with the accused, in such "case the accuser shall not obtain a sentence of divorce, for the "crime shall be supposed to have been remitted;" and this author states what he means by a probable knowledge of the crime committed, he says,—"probable knowledge in this case is, if the "husband suspecting his wife, shall charge her with the offence, "and she confess it, or if the witnesses whom he shall afterwards "produce, shall signify to him before the commencement of the "suit, that they can testify the offence from their own sight and "knowledge," that is, of course, that the witnesses have informed him what they have learned by their own sight and knowledge, whose testimony he is to use in procuring the divorce, in order to prove those facts which that very sight and knowledge would give him the means of proving, "or if the husband shall take her "in the act of adultery," and so on. Each instance which he states, is an instance, in which, it was quite impossible, but that the husband must know enough before he afterwards conducted himself to his wife, or so declared his opinions with respect to his wife,

as would amount to a condonation; but in those cases where the husband declares that he knows, or that he believes, his wife has been guilty of adultery, or where it is stated to him in an authentic way that she has been so guilty, and afterwards he thinks proper to pardon the offence by his conduct, there appears to be no necessity at all to inquire into the proof of the act of adultery, for, taking it that the act of adultery was committed, there has been a *remissio injuriæ*; but the case is widely different where you are acting upon your notion of what he believes, and impugning him, not from his own declaration, not from evidence tending to that, but you are taking upon yourself to say, that because in similar cases you would have believed it, (though, perhaps, the next man would not have believed it), you think better of your judgment than of another man's judgment, and you, therefore, infer that he believed that which you would have believed in the same circumstances.

"My lords, I am quite satisfied that this case has not been sufficiently considered upon these nice points, and there is one particularly which may require a little further consideration, and that is this, supposing it happens that a man has forgiven his wife the act of adultery committed at one time, it cannot be contended that *that* is to operate to all time thereafter that she pleases; and, therefore, the case is to be considered, not with reference to the conduct of the husband, as to one act of adultery alleged to have been committed in 1806, but the case, when put on the question of *remissio injuriæ* must be considered with reference to the years 1806, 1807, and 1808. If he did remit the injury committed in 1806, no man will argue that he thereby gave her a licence, as it were, to commit as many acts of adultery as she thought proper, in the years 1807 and 1808, and, therefore, when, in a case of this sort, judges jump to the conclusion that the husband has remitted, and do not at all establish that he was acquainted with the facts, and meant to forgive that which he knew had taken place, as contradistinguished from his being induced to believe that the fact of adultery had not taken place; and when, again, the point to which I have last adverted, is considered, that the *remissio injuriæ* cannot extend to a further period, I think it is fit the case should be further considered.

"My lords, I should be very unwilling to go more particularly into this. I think I have said sufficient for the purpose of founding upon it the proposition, which I intimated to your lordships the other day, that I intended to make. Feeling that we may possibly, in this part of the island, have different notions upon this subject in matters of pleading, from what the Commissary Court (who seem, however, rather more to agree with us than the Court of Session), and what the Court of Session may have, and that, therefore, this is that sort of case in which your lordships

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have been in the habit of recalling the attention of the Court of Session to the further consideration of the case, I would abstain for the present from either reversing or affirming the interlocutor, but would propose sending it back, by your authority, to the Court of Session, desiring them to review their several interlocutors, and upon that review to do what is just.

"I therefore move your lordships, in this very special case, to remit this to the Court of Session, and that they do review the several interlocutors complained of, and do, after such review, as to them shall seem meet and just."

It was ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of, and to do therein as to them shall seem just.

For the Appellant, *Sir Saml. Romilly, Thos. Thomson.*

For the Respondent, *Fra. Horner, Henry Cockburn.*

NOTE.—Unreported in the Court of Session. For further opinions of the judges, *vide* President Campbell's Session Papers, vol. 147, Nos. 11 and 12.

WM. KEIR, WM. CADELL, JAMES SCOTT, ALEXANDER ROBERTSON, and DONALD NICOLL, all occupying separate farms from, and Tenants of, the Duke of Atholl, . } *Appellants;*

JOHN, DUKE OF ATHOLL, . . . *Respondent.*

House of Lords, 15th July 1815.

LANDLORD AND TENANT—IMPROBATIVE LEASE—WRITING—POSSESSION—PAROLE—EXPENSE OF STAMPING—EXECUTION PENDING APPEAL.—Written offers were made by the tenants of the Duke of Atholl, through the suggestion of his factor, for fifteen years' leases of their farms, upon the footing of making and laying out money on improvements, and paying only a small increased rent. These leases were renewals of former ones. They entered on possession, made expensive improvements, and paid the landlord their rents for nine years, when they were warned to remove, although their leases had five years to run. No written acceptance had been returned to their offers, and no regular probative lease was gone into; and the landlord alleged that he had intimated to them that their offers were only accepted for nine years instead of fifteen. 1st, In an action of removing, held the lease good for fifteen years, and the tenants entitled to

damages for being ejected from their farms. 2d. It was objected that parole evidence to the effect, that the landlord had given a limited acceptance, was incompetent to contradict writing. Proof allowed before answer.

This was an action of removing raised by the respondent against the appellants, to have them removed from their respective farms, in which the following question occurred, Whether a tenant of lands, after having obtained possession, and continued in it for years, under a covenant of lease, and after having, on the faith of that covenant, made such permanent improvements as *no* prudent tenant would have made except upon the faith of his possession during the period of the covenant, is liable to an action of removing (ejectment) before the expiration of the term, where the written instrument or voucher of lease was not executed in the strict form of a legal deed?

The leases, the tenants stated, had been renewals of their former leases; and were finally agreed to with Mr Stobie, the Duke's factor, on 10th May 1800, for an endurance of fifteen years, which was Mr Stobie's own proposal; and it was also a part of these proposals that they should pay a small increased rent, and be at the expense of improvements.

The Duke's factor reduced this agreement into the shape of offers by the tenants addressed to the Duke, and he necessarily retained possession of these. His Grace was not, without their consent and knowledge, entitled to adhibit to these offers a qualified acceptance, or to limit the endurance thereof. At least, after the delivery of these offers, no intimation of any sort was made to the appellants by the Duke or his factor that the former disapproved.

The appellants entered on the possession of the farms, paid their rents, and made the improvements stipulated in their agreements, up till the 10th February 1809, when they got notice from the new factor, Mr Palliser, that their leases expired on 10th May 1809.

The sheriff repelled the defences, and decerned in the removing, against the tenants, *ut libellatur*, with £20 Scots damages against each of them. He afterwards recalled this interlocutor, and appointed the defenders to appear and be judicially examined, as craved by the pursuer. Their examination was negative of the point of any intimation having been made to them. He then allowed the pursuer to prove

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June 20, 1809.

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that they got notice that the acceptance of their offers was a limited acceptance, limiting the endurance to nine years.

An advocation was brought and passed to try the question, the appellants contending, that parole was incompetent to contradict a clear written title, and that the intimation of the alleged *restriction* of the endurance of the leases could only be established by writing. The bill having been passed, the Duke brought this interlocutor before the Court, and it being pressed to the Court that the proof allowed was *before answer*, it appeared to three of the judges that the point of law would be open after the proof was adduced, and that the bill ought, *in hoc statu*, to be refused. This was done by an interlocutor, remitting to the Lord Ordinary to refuse the bill and remit to the sheriff.

The respondent then presented a counter-bill of advocation, praying for a remit to the sheriff, to recall his interlocutor of 5th July, and to adhere to that of 12th May, decerning in the removing, but this bill was refused, and the cause then went back to the sheriff-court, and the proof was taken. The missives in the meantime had been stamped. The proof having

March 2, 1810. been accordingly gone into, the sheriff, of this date, decerned the tenants "to remove summarily on the 24th July," "and

July 24, 1810. "on that day decerned against them for the sum of £15, 8s. 9d. "of expenses, and £23, 14s. expended by the pursuer in gett- "ing the missives stamped."

On bringing this judgment under the review of the Court of Session, first by bill of advocation, which was passed, and then by reclaiming petition, the Court pronounced this inter-

Dec. 15, 1810. locutor: "Alter the interlocutor reclaimed against, and remit "to the Lord Ordinary to refuse the bill of advocation, and "remit to the sheriff to supersede the term of removal till "Whitsunday next; to divide between the pursuer and "defenders the expense of stamping the missives of tack; "reserving for future consideration the question as to ex- "penses incurred in this Court, since presenting the present "bill of advocation, but prohibits the clerks of the bills from "giving out a certificate of refusal of the bill of advocation, "till the box-day in the Christmas recess." Both parties reclaimed against this interlocutor: And the Court altered their former interlocutor, "in so far as it divides between "the pursuer and defenders the expenses of stamping the "missives of tack; and remit to the Lord Ordinary to re- "mit to the sheriff to find that the defenders are not liable "in any part of the expense of stamping the said mis-

"sives; also find neither of the parties liable to the other "in the expenses incurred in this Court since presenting the "present bill; and *quoad ultra* adhere to the interlocutor "reclaimed against."

Against these interlocutors, so far as unfavourable to them, the present appeal was brought to the House of Lords by the tenants. But, notwithstanding this appeal was duly intimated to the respondent, he made a new application to the Court, wherein he contended that, under the terms of the late Act of Parliament, he was entitled to eject the appellants, which was duly carried into execution.

Pleaded for the Appellants.—1st, That it is the established law of Scotland, that a lease may be effectually constituted by any writing, however informal, provided it has been followed by possession; and an *offer* by a tenant when followed by possession, and the rent offered, is received by the proprietor, is as obligatory as an acceptance in writing. The giving of possession to the tenant, and accepting payment of rents, show consent and approbation, and the proprietor is not entitled to resile *quia res non sunt integræ.*

Every one of the authorities referred to, goes to show that this is the law of Scotland, and nothing can be stronger than the case of the Countess Dowager of Moray, where it was decided by a judgment of this most Honourable House, that a lease which had never been signed by the landlord, but had remained in his possession, with the signature of the tenants alone, was rendered valid by subsequent acts of acquiescence. In this case it is admitted by the respondent, that the agreement and arrangement founded on, was entered into by Mr Stobie, the Duke's factor;—that written offers were given stipulating a fifteen years' lease by the tenants in consideration of their making certain improvements, and that on the faith of such lease, they entered into possession, made these permanent improvements, amounting to the sum of £440, and paid their additional rents for nine years. It would, therefore, be a great breach of good faith, if they were to be deprived of the benefit of the remaining years of the lease.

2. If a proof by witnesses to limit the term of endurance of the lease was competent, the Duke has totally failed in establishing the allegations which he undertook to prove, and as he rested his cause on that issue, namely, that it was intimated to the appellants that they were only to have a *nine* years' lease, the action of ejectment ought to be dismissed.

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No doubt Mr Palliser had impetrated from three of the appellants, an offer at that time, as if the leases were then to expire, but this was done under certain pretences, and under such deception as could give no support to the respondent's case. Lastly, By putting a construction on the late Act of Parliament regarding possession, which the legislature never intended, the appellants have been ejected from their farms, notwithstanding of their appeal. If it shall appear injustice was done to the appellants, your Lordships are enabled by the said Act, to give them relief, making it competent to your Lordships to give such judgment as the case requires. On the whole, the appellants humbly hope that your Lordships will reverse the interlocutors, and remit the cause to the Court, to ascertain the amount of damages the tenants have sustained.

Pleaded for the Respondent.—By the law of Scotland, writing is essential to the constitution of all transactions concerning land, and, among others, of leases of lands. Those entered into by informal or improbative writings, or verbally, constitute no obligation binding in law, and may, therefore, be resiled from at pleasure, by either party, so long as matters are entire, and no *rei interventus* has taken place; but the rule of *rei interventus* is not applicable to this case. Their plea is, that they entered into possession, paid rents for eight years, and made improvements on the faith of bargains of leases for fifteen years. But of the very existence of this bargain, which forms the basis of the appellants' plea in defence, there is not a trace of evidence. In fact it never did exist, unless a mutual contract between two parties could be constituted by the will only of one of them, without the consent of the other, which would be absurd. That in the present case, no bargain for leases for fifteen years ever was entered into between the appellants and the respondent's factor, Mr Stobie, is clear. 1st, Because the factor had no power to grant leases for that term of endurance. His power was expressly limited to nine years. 2d, Because Mr Stobie only wrote down offers as to two of the tenants, and the Duke instantly disapproved of them, and *expressly limited their duration* to nine years.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is hereby further ordered and adjudged

that the leases or agreements for leases of the several possessions of the appellants did not expire till Whitsunday 1815; and that the appellants are entitled to be paid and reimbursed, the amount of the damages severally incurred or sustained by them for or by reason of their having been respectively removed from their farms previously to such expiration of their leases or agreements for leases, including such costs as they have respectively reasonably been put to, or have reasonably sustained in the Courts below, or upon hearing their appeal. And, by consent, let such amount be ascertained by Dr Andrew Coventry, Professor of Agriculture in the University of Edinburgh, who shall report such amount to the Court of Session. And it is further ordained that the said cause be remitted back to the Court of Session, to do therein as to the said Court shall seem just, consistently with this judgment.

For the Appellants, *J. Haggart, D. Macfarlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

NOTE.—Unreported in the Court of Session.

(Muir-burning).

Major-General ROBERTSON of Lude; JOHN STEWART, his Cowherd, and JAMES JACKSON, his Tenant, . . . } *Appellants;*

The Most Noble the DUKE OF ATHOLL, *Respondent.*

House of Lords 5th July 1815.

DAMAGES FOR MUIR-BURNING.—In prejudice to the proprietor of Atholl forest, of his right of deer hunting and muir-game on part of the forest over which the appellant held a servitude of grazing his cattle, the appellant, General Robertson, set fire to the heath on that part. Held him liable in damages.

This case arose out of the circumstances of the appeal between the same parties reported *ante*, vol. iv. p. 54.

There the property of the seven shealings was held to be in the Duke, and a right of servitude of grazing his cattle on the same found to belong to the appellant, General Robertson, subject to the Duke's right of deer hunting, the latter always giving notice previous to his intention of hunting, so that the appellant's cattle might be removed.

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It appeared that the appellant, General Robertson, had not been satisfied with this adjustment of the rights of parties; and, accordingly, in order to frustrate the right of deer hunting, he set fire to the heath on the seven shealings, in the years 1806 and 1807.

An action of damages having been brought, by the respondent, against the appellant and his tenant, &c., for burning the heath, the Lord Ordinary found the summons relevant,

Feb. 25, 1808.

and that damages were due. On several reclaiming petitions to the Court, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—It is established by the evidence produced in the action for reducing the contract 1716, and award 1761, that the seven shealings or grass farms in question were the undoubted property of the family of Lude, before the date of that contract; and the only right now remaining in the Duke of Atholl is the right of deer hunting on the seven shealings. It is clear that this right cannot be exercised *emulously*. Due regard and respect must be paid to the superior rights of property; and the sole object in burning the heath was that this right of property might be more effectually secured, and the pasture land improved by it. It could not be to deprive the deer of a cover, for they had their own forest to go to, while, by improving the pasture, by burning the heath, he was increasing the quantity of food for those deer, so that the Duke had no interest to plead damage or hurt from the burning the heath.

Pleaded for the Respondent.—The contract 1716, and the award 1761, alluded to, expressly set forth that the appellant's right over the seven shealings "shall be without prejudice "always to his Grace the Duke of Atholl," to hunt the deer on the said shealings. This right, therefore, being established, the respondent had a material interest in preserving the heath on the seven shealings. Prior to that event, these shealings, which extends to 4500 Scots acres were the best grounds in Atholl for the shooting of muirfowl, and had always yielded a great yearly return of muir-game. The decree-arbitral does not find the property of the seven shealings to belong to the appellant, General Robertson. On the contrary, it finds that the property of these shealings is in the respondent, and a servitude of pasturage only in him; and although this decree-arbitral contains nothing about muir-game, yet it fixes the right of property, which is sufficient to comprise the right of

shooting grouse or muir-game. The burning of heath, such as was done here, could not improve the pasture. It was not a moderate or partial burning, but an entire burning of the surface of the whole ground, and was only resorted to in order to deprive the respondent of his just rights, and to prevent the exercise of hunting the deer, and to destroy his muir-game.

After hearing counsel, and due consideration had of what was said on either side, the Lords find that the Duke of Atholl is entitled to damages on account of the muir-burning complained of. It is, therefore, ordered that the cause be remitted back to the Court of Session, to review all the several interlocutors complained of, and to do therein what may be meet and just, consistent with this finding and declaration.

For the Appellant, *Sir Saml. Romilly, John Haggart, D. MacFarlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

NOTE.—Unreported in the Court of Session.

(Division of Commonty.)

Major-General ROBERTSON of Lude, . . *Appellant;*

His Grace the DUKE OF ATHOLL, . . *Respondent.*

House of Lords, 5th July 1815.

DIVISION OF COMMONTY.—In an action for division of commonty, objections were stated to the procedure of the sheriff in taking the proof and other procedure before him under remit of the Court, but these were repelled.

The respondent and appellant, being proprietors of lands in the neighbourhood of each other, possessed a common right, or right of commonty, in a piece of ground called the common of Glentilt, as set forth in a previous appeal; and this was an action of division of commonty brought by the appellant's father to have that common divided under the statute, which action was, after his father's death, insisted on by the appellant.

The parties' interested in the common were the appellant and respondent, together with the minister of Blair.

The Court remitted to the sheriff-substitute of Perthshire,

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who took a long proof in presence of the appellant and his agent. Under his authority the common was valued, and by his direction a survey and plan thereof was made out in the manner directed by the Lord Ordinary. The sheriff then pronounced a judgment ascertaining the extent of the commonty, agreeably to the evidence, written and parole, and dividing the same among the parties, in terms of the statute and the remit to him by the Court of Session.

The sheriff having reported the whole of his proceedings to the Court, a state thereof was made up in the usual manner; and a remit made to the Lord Ordinary, who, of this

June 30, 1810. date, pronounced this interlocutor: "Having considered the "foregoing state of the process of division of the commonty of "Glentilt, the remit thereof by the Inner House to the Lord "Ordinary, with the whole writings referred to in the said "state and produced in process, depositions of the witnesses, "plans of said commonty and contiguous grounds of those "having interest in the same: Also having considered the "whole conduct in this business of the sheriff-substitute of "Perthshire, who, by appointment of the Court, acted as a "commissioner in directing and superintending the proofs, "the ascertainment of the marches by the help of Mr David "Buist, land-surveyor, and other previous steps necessary for "expediting the said division, with the final report made by "the said commissioner, as to the manner in which he pro-"posed the said division to be settled and adjusted; and "having likewise considered the written objections given in "for General Robertson, against the proceedings and report "of the commissioner, with answers thereto for the Duke of "Atholl, replies and duplies; and having heard a counsel for "General Robertson, at considerable length, in support of his "objections (the counsel on the other side having declined to "say any thing in addition to their written argument) repels "the whole objections to the proceedings and report of the "commissioner, whether as to the bounds of the commonty, "and marches between it, and the several property lands of "the parishes, or as to the extent of the shares of the com-"monty, to which the respective parties ought to be found "entitled, or as to the allotments of the several shares in "respect of contiguity to the parties' other several lands, or "as to any other matters objected to, ratifies, approves of, "and confirms the divisions and allotments proposed, by the "said commissioner's report, which are explained and illus-"trated by the engraved plan, made out and coloured by the

"said land surveyor, under the commissioner's direction, "according to the testimony of the most creditable of the "witnesses, and particularly of such of them as the General "has no right to object to; of which engraved plan three "copies are now subscribed by the Lord Ordinary as relative "hereto; one to be given to the Duke of Atholl, another to "General Robertson of Lude, and a third to be kept among "the warrants of the decree: Finds, that the several allot-"ments and shares of said commonty as above specified, are "to belong to the parties in whose favours such allotments "are respectively made, heritably and irredeemably, and to "be held by them, and their heirs and successors, as parts "and pertinents of their several property lands of consent: "Reserves to General Robertson his proportional share of "the marle that may be found in the mosses, until the same "is exhausted, and finds, decrees, and declares accordingly." Nov. 18, 1810. Dec. 5, 1810. On several reclaiming petitions by General Robertson, the Court adhered. Nov. 29, 1811. May 22, 1812. Mar. 9, 1813.

Against these interlocutors the present appeal was brought to the House of Lords, but their Lordships affirmed the judgment of the Court below.

For the Appellant, *Sir Saml. Romilly, John Haggart, D. M'Farlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

ARCHIBALD COCHRANE of Askirk, . *Appellant;*

The Right Honourable GILBERT, EARL OF MINTO, ... *Respondent.*

House of Lords, 5th July 1815.

PROPERTY IN WATER.—Held that the respondent was entitled to the entire property or *solum* of a loch in which the appellant claimed also a proprietary right opposite to his lands. Reversed in the House of Lords, and held that each party's interest in the loch extended *ex adverso* of his lands from the shore to the middle of the loch, and that each party might dig marle within his own division.

The appellant stood infeft in "All and whole the six-hus-"band lands and mill of Askirk, with the astricted multures "of the whole barony of Askirk, the five merk land of Kirk-

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"house of Askirk, the twenty shilling land of Salineside "called Wreathlongshot and Broomshaugh, the lands of "Broadlee, Castleside, Leaphill, Rhymer's Croft, Rye Croft, "Roundhaugh, and Lawhope meadow, being all parts and "portions of the ancient barony of Askirk lying in the shire "of Roxburgh." The appellant purchased these lands, which all lie contiguous, in 1795.

Dec. 10, 1778. The predecessor of the respondent acquired right to one farm called Easter Essenside, part of the same barony of Askirk, and was infeft in 1778.

Intersected between the lands belonging to the appellant, and the farm of Easter Essenside, belonging to the respondent, is a loch or lake, about the property to which, and the marle it contains, the present dispute arose.

The respondent had laid claim to the exclusive right to the loch, stating that his lands of Easter Essenside almost surrounded the whole loch, except at the point L marked on the plan, where the appellant's lands of Castleside were, and where, perhaps, the proprietors of these lands had acquired, most probably by sufferance, a right of watering their cattle. He also founded on an excambion to show that the pieces of land extending along the north east side of the lake, had been disjoined from Essenside, and annexed to Castleside, in consideration of another piece of land lying more conveniently to the lands of Essenside, and he concluded, that this transaction limited the right acquired by the appellant, to the specified extent of land.

Neither in the title-deeds of the appellant, nor the title-deeds of the respondent, was any right expressly given as to the loch; and the Court, therefore, pronounced interlocutors holding the loch common to both; but at this juncture of the procedure, the excambion, together with the decree-arbitral entered into on that occasion, was discovered and produced; and from these the Court changed their opinion, holding that the appellant's right was limited, by the terms of the excambion, to the land so given by it, as ascertained by measurement, while the property of the lake remained as before, attached to the lands of Essenside.

May 17, 1810. The Court, therefore, found "that the defender (respondent) "is sole proprietor of the *solum* of the loch, in so far as the "water now extends; and, in so far, sustain the defences "and remove the interdict. Find the pursuer (appellant) "liable in the full expense of extracting the decree, and "decern; reserving to the pursuer his claim to fish in the

"loch, and to have the water thereof as the boundary of his "property, and to the defender his objection as accords."

Other procedure followed, but the Court ultimately adhered to the above interlocutors.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The appellant has a right of property in the loch to a certain extent at least, even according to the respondent's own statements. The respondent has uniformly acknowledged, in every stage of the proceedings, that, before the excambion, and independently of that transaction, the appellant's lands of Castleside reached the water of the loch in that quarter, which lies to the north of Lochgreen, that is to say, northward of the letter C marked on the plan annexed to appellant's petition of 6th June 1810. In proof of this it is sufficient to refer to the respondent's first condescendence (annexed to the petition for Admiral Elliot of date 15th September 1808), given in by appointment of the Lord Ordinary; and to his last statement made, in presence of the sheriff, in both of which, this fact of the appellant's lands of Castleside being conterminous with the loch, is admitted in explicit terms. In this situation, the appellant cannot, consistently with law, be excluded entirely from the loch, but must be allowed to have a right therein, less or more, as being a conterminous heritor.

2d, But he has not only a right and interest in the loch, in respect of the ground between C and D, part of the property of Castleside having originally extended to the loch, but also on account of the excambion founded on by the respondent, the legal effect of which was to confer upon the appellant's authors, and him, as now become *proprietor* of *Lochgreen*, a right and interest in the loch, of the same nature and extent which the proprietors of Essenside formerly had as proprietors of Lochgreen, as well as that part of the appellant's lands which bordered on the loch originally.

3d, Upon the supposition of the proprietor of Castleside having acquired, by the excambion, a right to have the water as his natural boundary, and, of course, a right to follow the water as it recedes towards the centre, it is submitted that there can be no just ground for the finding, "That the "defender is sole proprietor of the *solum* of the loch, in so "far as the water now extends." This finding is declaratory of an exclusive right to the respondent, so that it never could be allowable to the appellant to follow the water as his

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boundary a single inch within the margin of the loch as it presently stands.

Pleaded for the Respondent.—1st, The lands of Essenside having, prior to the excambion in 1760, completely encircled the lake in question (except in one very small spot, where there appears to have been a way to an *aquahaustus*), the possession of those lands necessarily conferred upon the proprietor the exclusive property of the lake; and that exclusive property could not be impaired by the excambion, which merely disjoined from Essenside a small portion of the land precisely ascertained by measurement, without containing any grant, either express or implied, of any interest in the lake itself.

2. The manner in which the respondent, the present proprietor, has exercised that exclusive right, is not such as to require any legal interference by suspension, as the gradual, and almost imperceptible deepening of the lake by digging for marle, cannot possibly diminish the supply of water for the appellant's mill, which is besides, from its situation on a very considerable stream, totally independent of any supply which the very small rivulet from the lake can afford.

After hearing counsel,

LORD REDESDALE, said,*

"My Lords,

"Mr Cochrane, the appellant in this cause, has a property of considerable extent, with the mill of Askirk, part of the barony of Askirk in the county of Roxburgh, which he purchased in 1795.

"Admiral Elliot, the predecessor of the respondent, in 1778, purchased the farm of Essenside, situated in the same barony.

"It was said that the proportional values of these properties were considerably different. That the appellant's property was valued in the cess-books of the county at £1048, 10s. Scots, and that the property of the respondent was valued in these cess-books at £365, 10s. Scots, but this difference of valuation appears to me to be of no weight in the present question. The present question respects a lake or loch, situated between the lands belonging respectively to these parties.

"It now comes to be decided, whether either has a right to this loch, and in what proportions, on account of their rights to the lands next adjoining to the lake. Where the contrary does not appear, if a person's land extend round an entire lake, the law will presume that he has right to the whole; and if they extend round half of the lake, it will presume that he has right to the half, and so on.

* Taken by Mr Spottiswoode.

"It certainly appears that originally a very small part of the lands now belonging to the appellant bordered on the lake. There was a right of taking water from it to the mill, and probably a right of watering cattle. On the other hand, the property of Essenside certainly did originally surround the lake, and the present question depends upon the effect of an exchange made between the property of Essenside and Askirk.

"In 1759, one James Shortreed appears to have been proprietor of the lands belonging to the respondent. The appellant's property then belonged to a person of the name of Wilkinson, who, in 1795, sold the same to the appellant.

"In 1807 the late Admiral Elliot set up a claim of exclusive right to the lake, and put a drag boat on it to obtain marle. The appellant applied for a suspension to the Court of Session, and also raised an action of declarator before that Court, concluding to have it declared that the lake belonged to the parties as their common property, in other words, that it was common to both.

"This suspension and declarator were conjoined. Admiral Elliot alleged that there had been a verbal excambion in regard to this lake, and on the 29th of January 1808, the Lord Ordinary appointed him to give in a condescendence upon this allegation.

"Admiral Elliot accordingly gave in such condescendence founded upon this verbal excambion, and the Lord Ordinary, on the 11th March 1808, pronounced an interlocutor, finding the lake common to both.

"The appellant then craved an interdict, which was accordingly granted by the Lord Ordinary, on 24th June 1808.

"The effect of these interlocutors was to give Admiral Elliot and the appellant a mutual right to the lake, opposite to their respective lands. Admiral Elliot to possess or to have a proportion of 36 out of 55. Admiral Elliot reclaimed to the Lords of the second division, who, on the 2d of February 1809, adhered to the Lord Ordinary's interlocutor with an explanation, that the respective rights of the parties were to be regulated by a line drawn from two centres or *foci* of the north-western and south-eastern ends of the lake.

"Admiral Elliot having died, Lord Minto was then sisted as a party to this cause; and he gave in a new condescendence, stating that after the excambion took place, there was still a small stripe of land which remained part of the estate of Essenside, lying between the appellant's land and the lake, and that there was also a road which separated the ground exchanged from the lake, which had been made without interruption, and ever since used by the tenants of Essenside.

"In the condescendence which Admiral Elliot had given in, these particularities were not mentioned. It was then stated in a minute on the part of Lord Minto, that he had recovered written

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evidence of the excambion, and on the 15th November 1809, the Lords of the second division pronounced the first interlocutor appealed from, remitting to the Sheriff of Roxburghshire to visit and inspect the subjects in question, and if necessary to take proof therein, and make his report.

"The sheriff having made his report, the Court, on the 16th May 1810, pronounced an interlocutor altering the interlocutors of the Lord Ordinary, and finding that Lord Minto was the sole proprietor of the *solum* of the loch.

"The appellant reclaimed; and on the 8th June 1810, the Court pronounced an interlocutor appointing the petition to be answered, and directing the sheriff to report the exact extent of that part of Castleside that originally touched the lake.

"On the 22d June 1810, the Court superseded consideration of a petition for the appellant to examine further witnesses, till the sheriff's report was received.

"On the 10th July 1810, the Court interdicted both parties from digging up or carrying away the marle from the lake, till the appellant's reclaiming petition and answers were disposed of, and on the 29th November 1810, the cause was finally decided in favour of the respondent.

"From these interlocutors the present appeal was brought, and the question now is, Whether the interlocutors of the Lord Ordinary or the interlocutor of the Court appealed from, have decided this matter rightly. This depends upon the effect of the exchange or excambion.

"At first it was said that it was a verbal exchange, but the writings were afterwards recovered and printed." (Here his Lordship read the submission and decree-arbitral).

"Your Lordships find that, by the terms of this submission, Mr Shortreed, the proprietor of Essenside, agreed to exchange some corn land from a march stone at the foot of Castleside hill, in a straight line *to the loch* of Essenside, and another piece of ground against a point of land on the north west of the farm of Broadlee belonging to Mr Wilkinson, quantity for quality.

As I understand the submission, the consequence must have been, that the loch of Essenside was to be the boundary in so far as the ground came to the lake. It was said that there was still a way at the bottom of this field, and along the lake, reserved, but I find nothing to counteract the terms of the submission which carry the bounds of the property to be exchanged to the lake itself.

"The evidence on both sides on the subject, seems very little to be relied on. It appears that the cattle on both sides went to the water. This does not in any degree alter the instrument which carries the bounds of the property to the lake itself. By the plan which was produced to us, the stripe of land was carried

on to the edge of the lake. As the water receded, there would, of course, be a slip of land between the lake and what was its former margin; the water has now receded farther, and that piece of land is larger than before.

"It is impossible to consider it as the meaning of the parties to the excambion, that the boundary of the appellant's property was to be continually changing as the lake receded or otherwise. The consequence of the lake being the boundary, was, that the property must have extended to the lake, and as the rights to the lake belong to the parties only as pertinents to their adjacent lands, it does appear to me, upon the whole, that the original interlocutors of the Lord Ordinary in this case were right, and that the subsequent interlocutors of the Court were wrong. But I move the further adjournment of the cause, in order to consider of the terms of the judgment."

(On 5th July 1815, his Lordship recapitulated some of his former observations, and then moved the reversal of the interlocutors complained of as below).

It was ordered and adjudged that the several interlocutors complained of in the said appeal be, and the same are hereby reversed. And the Lords find and declare that each party's interest in the loch does extend *ex adverso* of his own lands from the shore to the middle of the loch, and that each party may dig marle within his own division; and that the appellant's land on the shore of the loch extends from *Essenside Burn*, the march of *Castleside* and *Essenside*, to a line drawn from the march stone at the foot of Castleside Hill to the loch, including the lands acquired by Thomas Wilkinson by the excambion with James Shortreed, referred to in the pleadings. And it is ordered that the cause be remitted back to the Court of Session to proceed accordingly.

For the Appellant, *Mat. Ross, Thos. W. Baird.*

For the Respondent, *Sir Saml. Romilly, John Clerk, George Cranstoun, John Fullerton.*

NOTE.—Unreported in the Court of Session.

Dr THOMAS HAY, Edinburgh, . . *Appellant;*

JAMES SCOTT and JOHN REID, Merchants, Leith, and ROBERT BURN, Architect, Trustees of ROBERT INGLIS, Builder, } *Respondents.*

1816.

House of Lords, 21st February 1816.

HAY v. SCOTT, &c.

BUILDING CONTRACT—EXTRA CHARGES—Circumstances in which in a building contract, extra charges were sustained.

This was an action raised by the trustees on Inglis' bankrupt estate for £1612 due to the bankrupt, under a building contract with the appellant, whereby Inglis built him several houses in Blair Street, Edinburgh.

The question turned upon the particular facts; and, *inter alia*, the amount of extra charges made, in which, after having allowed a proof, the Court finally decerned against the appellant for £769.

He took these interlocutors by appeal to the House of Lords, and that House affirmed the judgment of the Court below, with £100 costs.

For the Appellant, *Wm. Adam, Fra. Horner, Andrew Rutherfurd.*

For the Respondents, *Sir Saml. Romilly, John Tawse.*

1816.

WILLIAM RICHAN, Esq. of Rapness, . *Appellant;*

RICHAN v. STOVE, &c.

ROBERT STOVE of Windbreck, in the county of Orkney, and ALEXANDER GUILD, Writer in Edinburgh, his Agent in the Court of Session, ... *Respondents.*

House of Lords, 21st February 1816.

PROPERTY—UDAL TENURE—SEA WARE—KELP—PRESCRIPTIVE POSSESSION—A party was held entitled to cut tangle, also to sea-ware, pasturage, and kelp, as immemorially possessed by him, though his property was at a distance from the shore, and though he could produce no written title—the tenure being udal.

The appellant raised an action of declarator before the Court of Session, concluding that it should be found that he had sole and exclusive right and title to the whole shores of the lands of Braebuster, and to the whole kelp, ware, or tang growing thereupon, and in the sea opposite thereto; and also to the whole kelp and other ware thrown in by the sea on the sea shores, in all time coming; and that it should be found that he had good right and title to exclude and debar the respondent and all others, proprietors and possessors of the one farthing land of Windbreck, at present possessed by him,

from cutting, manufacturing, and carrying away any part of the kelp, ware, or tang growing upon the said appellant's lands. And that his lands of Braebuster are free from any servitudes or right of common of that nature.

The respondent alleged and offered to prove, 1st, That he was udal proprietor of the lands of North Windbreck, which form a part of, and are situated in the town of Braebuster, and parish of Dunness. There was no written title, the tenure being udal, but an excambion had taken place in 1773, in which five ridges of lands had been exchanged by the respondent, for as much land adjoining to the house of Windbreck belonging to George Richan. 2d, That to this town a proportion of the kelp shores is attached, to which ware the proprietor has a right corresponding to his right in the town. 3d, That between the arable lands of Braebuster and the shore, there intervenes a proportion of pasture ground, which was enjoyed as an undivided common by the different proprietors in the town. 4th, That neither at the planking and excambion which took place in 1773, nor since that period, had any division of the grass and pasture been made. 5th, That the defender (respondent) had a proportional right to this common, and he and his ancestors had exercised a right of common pasturage, and of casting peat and divot thereon, past the memory of man. That the appellant has appropriated to himself a considerable part of this common, and enclosed it without any authority from the other proprietors. 6th, That the defender and his ancestors had enjoyed, as their own property, a certain portion of the kelp shores opposite to the Ness of Braebuster, and have cut tang, and manufactured kelp there, for more than forty years. That his right to this portion of the kelp shores, was always recognized by the pursuer (appellant), and his predecessors, previous to the commencement of this process, and the pursuer had offered to give the defender a portion of ground in exchange for his part of the shores. 7th, That the said planking and excambion in 1773, was considered as unfavourable for the defender's (respondent's) father.

A proof was allowed and taken. From this it appeared, that the town of Braebuster was situated a little distance from the shore, and between it and the sea shore lay interjected the Ness of Braebuster, which had been immemorially possessed as an undivided common by the proprietors of the whole town of Urisland; and upon this common the respondent's ancestors, jointly with the other proprietors, exercised

1816.

RICHAN v. STOVE, &c.

all the rights of property. They pastured cattle, cut peats for fuel, and carried off the sea ware for manure. The respondent's ancestors had also, for the period of forty years, exercised the right of manufacturing kelp, and had set off a portion of the shore of the Ness, for the exercise of that right; and this portion of the shore had been enjoyed by him and his predecessor for that period up to the present time.

The appellant founded very much on this, that the respondent's lands were remote from the shore, though coming down in a point on it, and in terms of the decision in the Earl of Morton *v.* Covingtry, he was not entitled to cut tang for kelp, reserving to him the servitude to carry off wreck and ware cast on shore.

June 20, 1760, Fac. Coll., vol. ii., p. 406; et Mor. 13528.

The cause came first before Lord Justice Clerk Hope, as Ordinary, who pronounced this interlocutor: "Finds, that as "there is no reservation of kelp shores in the excambion, the "defenders' (respondents') former right thereto, corresponding "to his five ridges in Braebuster, must be held to be com- "pensated by the extent of land given to him in exchange "by the plankers: Finds that he has not condescended on "any title which gives him a right of commonty in the "Ness of Braebuster, so as to support the further claim to "the kelp shores adjoining to the alleged common; therefore "repels the defences, and decerns in terms of the libel. But "in respect of the loose terms of the planking or excambion, "and the possession had by the defenders, finds no expenses "due."

The planking here alluded to was in the following terms: "Be it known unto all men whom it may concern, that I, "John Stove of Windbreck, doth hereby agree with George "Richan of Linklater, that the five ridges of land in the "township of Nether Braebuster, now in my possession, shall "be exchanged for as much land adjoining to the house of "Windbreck, the property of the said George Richan, and that "to be at the determination of George Johnstone, planker, "for equal quality and quantity; and further, when said "division is made, I agree, that this, if required, shall be "made out on stamped paper, in the due form of law. As "witness my hand, the 16th November, in the year 1773.

his
(Signed) "JOHN + STOVE.
mark.

(Signed) "In presence of MAGNUS SMITH.
"WM. BRISK."

In consequence of the deed of excambion, the following award took place,—

"Planker's Decision."

"The five ridges at Braebuster is now exchanged, which amounts to one-half plank and thirty square fathoms, for one thousand three hundred square fathoms below Windbreck, which was left to the determination of us, the subscribers.

his
(Signed) GEORGE + JOHNSTONE.
mark.
MAGNUS ISBISTER."

Both parties reclaimed against the above interlocutor, the appellant, in so far as it did not allow him expenses, and the Court, of this date, pronounced this interlocutor, "The May 15, 1810.
"Lords having resumed consideration of the petition and "answers for Captain William Richan, the condescendence "and answers and proof adduced and advised the whole, "alter the interlocutors of the Lord Ordinary complained "of in the petition of Robert Stove: Find him entitled to "tangle, sea-ware, kelp, and pasturage, as formerly possessed "by him, and therefore sustain the defences; assoilzie him "from the conclusions of the pursuer's libel, and decern; "and find the said Robert Stove entitled to the expense of "process; and allow an account thereof to be given in, and "remit to the auditor to examine the same and report." On another reclaiming petition the Court adhered. June 8, 1810.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The appellant is the sole proprietor of the lands of Braebuster. These lands run along the shore from the burn of Oyce on the north, to the burn of Milichan on the south; and as proprietor of the lands so running along the shore, he has the sole and exclusive right of cutting tang, and manufacturing kelp on these shores, as was established in the noted case of Lord Morton *v.* Covingtry, 20th June 1760. 2d, The contract of excambion contains no reservation of cutting tang or manufacturing kelp on the sea shores opposite to the land so alienated, and without such express reservation, it cannot be contended that the respondent has such right. It is proved distinctly, that the Ness of Braebuster is not, and never was a common; that it was once cultivated; that it lies in the middle of the appellant's property; that it belongs to, and is now exclusively

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occupied by him, and that the greatest part of it has been enclosed by him without molestation. Supposing the respondent to have proved a right of pasturage on the said Ness, which he has not done, this being a mere servitude, would not confer a right to the kelp shores.

Pleaded for the Respondent.—The question here depends solely upon immemorial possession, and the proof of that possession. The lands of Windbreck form a part of the town of Braebuster. To this town the kelp shores have been immemorially attached, and have been possessed by the respondent in proportion to his interest in the town. The lands in Orkney held by udal tenure have never been feudalized, so that the possessors are not required to exhibit written titles to instruct their right; but the overwhelming amount of evidence as to the respondent's possession, places this case beyond all doubt.

After hearing Counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed with £50 costs.

For the Appellant, *Sir Saml. Romilly, J. P. Grant.*

For the Respondent, *Fra. Horner, R. Jameson.*

NOTE.—Unreported in the Court of Session.

1816.

BALFOUR v. LUMSDAINE.

[Fac. Coll., vol. xvi., p. 299].

JOHN BALFOUR of Balbirnie, . . *Appellant;*

Major JOHN LUMSDAINE of Lathallan, . *Respondent.*

House of Lords, 14th March 1816.

ENTAIL—PRESCRIPTION.—The heirs under a certain entail were also heirs of line, and, on succeeding, possessed on titles as heirs of line, and not under the entail for thirty years, and on apparency for a period beyond the negative prescription. A party having succeeded under this title, but who was excluded by the entail, an heir of entail raised the present action to set his right aside. Held that the negative prescription did not cut off the entail, there being no conflicting infeftments.

1753.

John Lumsdaine, W.S., was unlimited proprietor of the estates Blanerne and of Lumsdaine. In 1753, he executed an entail of these estates, "to and in favour of the said James "Lumsdaine, my eldest son, and the heirs male or female to "be procreate of his body, and the heirs of their bodies, whom

"failing, to John Lumsdaine, my second son, and the heirs "male or female to be procreate of his body, and the heirs "of their bodies; whom failing, to Andrew Balfour, third "lawful son of Robert Balfour Ramsay of Balbirnie, only "lawful son procreate betwixt the deceased George Balfour "of Balbirnie, and Agnes Lumsdaine, my sister German, "and the heirs whatsoever of the body of the said Andrew "Balfour," whom failing, to other substitutes, until it came to the respondent, and other Lumsdaines after him.

The entail contained strict prohibitory, irritant and resolutive clauses against altering the order of succession.

It also contained an exclusion of Andrew, Robert, and James Balfour, in case they came to succeed to their family estates of Balbirnie and Whitehill.

March 5, 1756.

The entail was duly recorded. The maker of this entail died in 1758. He was succeeded by his eldest son, James Lumsdaine, the first heir of entail.

1758.

He made up no titles to the estates, and died unmarried in 1764, in a state of apparency.

1764.

Upon his death, John Lumsdaine, late of Blanerne, the second son of the entailer, succeeded to the estates. In 1769, he entered into a post-nuptial contract of marriage, in which he granted a procuratory for resigning the whole lands for new infeftments thereof, to be granted to himself and the heirs male of his then marriage; whom failing, to the heirs male of his body of any subsequent marriage; whom failing, to the heirs female of his then marriage; whom failing, to his heirs female of any subsequent marriage; whom all failing, to his own nearest heirs and assignees whatsoever.

1769.

Afterwards he made up titles in 1776, as heir of line, and was served heir in general of line to his father, taking no notice of the entail of 1753. He thereupon obtained precept of clare from the superior, and was infeft in December of the same year.

1776.

He died without issue in 1803, and the appellant, also passing by the entail, served heir of line to him, by a general service, and was infeft 12th March 1804.

1803.

1804.

The respondent then brought his action of reduction, improbation, and declarator, in 1808, to have it found and declared, 1st, That the appellant had no right or title to the said lands of Blanerne, as not being called to the succession thereof by the above entail, and that the said lands belonged to the heirs of tailzie and provision. 2d, That the said John Balfour, as proprietor of the estate of Balbirnie, is excluded

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and debarred by personal exclusion and exception in said entail from succeeding to the entailed estate of Blanerne, and that the said James Balfour, now General James Balfour, as next surviving heir of tailzie and provision, and failing the said General and his issue, then the respondent and the heirs of provision substitute to him, are entitled to succeed.

The question, therefore, was, Whether the entail was wrought off by the negative prescription? It will be observed, that those who were called to the succession, had possessed, beyond the period of the forty years' prescription, first, upon apparency, but afterwards for a period much shorter than forty years, upon titles made up by them in fee simple.

The defences stated to the action were, 1st, No title to sue. 2d, His title to insist in the action was cut off by the lapse of forty years, that is, by the negative prescription. It was answered, that the rights of property cannot be lost by the negative prescription, unless it be also accompanied by the positive prescription.

May 31, Signed June 1, 1811.

Mutual informations having been ordered by the Lord Ordinary to report the case to the Court, the Second Division pronounced this interlocutor:—"Upon the report of Lord "Robertson, and having advised the mutual informations "for the parties, the Lords sustain the pursuer's title to "insist in this action; and find that the defender has pro- "duced no sufficient title to exclude, and remit to the Lord "Ordinary to proceed accordingly: Find the defender "liable in the expenses hitherto incurred, appoint an account "thereof to be given in, and remit to the auditor to report "thereon."*

July 4, 1811.

Dec. 10, 1811.

The defender having satisfied the production before the Lord Ordinary, his Lordship sustained "the reasons of reduc- "tion, and repels the defences, and reduces, decerns and "declares in terms of the conclusions of the libel and amend- "ment thereof." And on reclaiming petition, the Court unanimously adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant's right to the lands in question being established by the positive prescription, the respondent cannot be allowed to disquiet his possession. By the Act 1617, c. 12, it is enacted, "That whosoever

* The judges were unanimous in holding, that the decision in the case of Welsh, *ante*, p. 65, applied here.

"his Majesty's lieges, their predecessors and authors, have "brooked (enjoyed) heretofore, or shall happen to brook in "time coming, by themselves, their tenants and others having "their rights, their lands, baronies, annual rents, and other "heritages, by virtue of their heritable infeftments made to "them by his Majesty or others, their superiors and authors, "for the space of forty years continually and together, fol- "lowing and ensuing the dates of their said infeftments, and "that peaceably and without any lawful interruption made "to them during the said space of forty years, shall never "be troubled or inquieted in the heritable right and property "of the said lands," "by any other person pretending right "to the same," "provided they be able to show and produce "a charter of the said lands and others foresaid," "with "instrument of sasine following thereupon, or where there "is no charter extant, that they show and produce instru- "ments of sasine one or more, continued and standing together "for forty years, proceeding upon retour or precepts of clare "constat." In the precise terms of this statute, the appellant pleads that he and his predecessors have been in the possession of the lands in question by virtue of charters and sasines standing together for upwards of forty years, dating from the investiture of John Lumsdaine, senior, while no interruption is alleged to have taken place till the present action was commenced in September 1808, long after the forty years' prescription had elapsed.

The respondent objects that the charters and infeftments in the person of Mr Lumsdaine, senior, were altered and done away by the deed 1753; and that the possession of his sons, till the youngest of them made up his titles as heir at law, in 1776, must be ascribed to the deed of entail by which they were called, and in this way forty years have not elapsed at the commencement of this action. But to this the appellant replies, that the deed, in 1753, remained a personal right, which could not be the title to the estate till completed, in opposition to the complete feudal right, and more especially such a deed as this, which was not a conveyance, but merely an obligation to convey, a power to resign the lands and alter the destination which was never executed. The possession of the apparent heir is a continuation of the possession of the ancestor, and on the same feudal title, upon the clear principle of law which considers him *eadem persona cum defuncto*; and the heir's possession on his apparency, is, therefore, to be reckoned in the period of prescription, as was solemnly

Jan. 22, 1791. Fac. Coll., vol. x., p. 325; et Mor. p. 10810.

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decided by the unanimous opinion of the judges in the case of Caitcheon *v.* Ramsay, in conformity to many prior decisions. Where a person has two titles, on either of which he may possess, as the sons of Lumsdaine, senior, had in this case, his possession must be ascribed to the most favourable title, to an unlimited, in preference to a limited, one. And that the sons did, in fact, all along possess, as heirs at law, and unlimited fiars, and not under the personal entail, is demonstrated by the conduct of John Lumsdaine, the younger, in the contract of marriage in 1769, and in making up titles, as heir to his father, in 1776.

2. The right which the respondent asserts to be in him as a substitute heir by the deed 1753, has been lost by the *negative* prescription, and cannot now be the ground of action, or have any effect in operation. This negative prescription is established by the Act 1469, c. 28, and applies to every personal obligation or right of action which can be figured, and which are not excepted by the Acts, and it is of no importance in what form the right of the creditor or the obligation is constituted. A burden is laid upon the party in whose favour the right of action is conceived, or in whom it vests. If he does not follow forth his right in forty years, he loses it. The negative prescription depends in no degree on the title by which another person holds; it operates as a direct and complete discharge and renunciation by the person who was previously entitled to sue or claim as a consequence of his neglect. Now, it is undeniable, that the ground of the present action is nothing else than a *jus crediti*, a right to sue for the preservation or enjoyment of what was given by the deed of entail. That deed (if good), gave to the heirs or substitutes, a right to insist that all its provisions be fulfilled, and titles made up in conformity to it. But this not having been done, their right under the entail was cut off by the negative prescription.

Pleaded for the Respondent.—The negative prescription, equally with the positive, did not begin to run in this case until a title hostile to the estate was made up by the late Mr Lumsdaine, in 1776; till that period, it was to be held that the possession of his elder brother, and of himself, had been, by virtue of the entail executed by their late father; and until such hostile title was made up, the substitute heirs of entail were *non valentes agere.*

2. It is settled law, in a case like the present, that the negative prescription can only be pleaded by a person

who has established in himself a title by the positive prescription; and the appellant has no such title in him in this case.

3. The appellant, in a lease, in which he was a party, made subsequently to the death of the late Mr John Lumsdaine, recognized and acknowledged the entail in 1753 to be valid and effectual in favour of his brother, the substitute-heir then entitled to possession; and, according to that recognition and acknowledgment, General Balfour is now the heir entitled to take under the entail.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *David Cathcart, James Moncrieff.*

For the Respondent, *Sir Saml. Romilly, John Clerk, W. G. Adam.*

[Fac. Coll., vol. xvi., p. 17.]

Miss MARGARET CARMICHAEL, only child of the late Sir John Gibson Carmichael of Skirling, Bart., and her Tutors and Curators, ... } *Appellants;*

SIR THOMAS GIBSON CARMICHAEL of Skirling, Bart., ... *Respondent.*

House of Lords, 15th May 1816.

TAILZIE—SERVICE—PASSIVE TITLE.—1st, A party possessing an estate on apparency, executed an entail, in which there was an obligation binding his heirs, "to fulfil and perform the whole obligations prestable by me at my death." Held, that though he could not make an effectual entail on apparency, yet that the obligation in the said entail descended, and was a ground to compel the heir of line to implement the conditions of the entail, and to make up proper titles, in terms thereof; and, 2d, That this obligation was onerous, and transmitted in terms of the Act 1695, c. 14, against the heir passing by and serving to the ancestor last infeft.

The late James Carmichael, W.S., died proprietor of the estate of Easter Hailes. He was succeeded by his brother, the Earl of Hyndford, who was served and retoured heir in gene-

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ral to him in January 1782. The Earl of Hyndford did not make up any feudal title to the lands of Easter Hailes, but, possessing on apparency, suffered the estate to remain *in hæreditate jacente* of the deceased.

In 1784, the Earl executed an entail, comprehending various estates, in which he was feudally infeft. He also included the estate of Easter Hailes, in which he was not infeft.

The appellant contended that, while in a state of apparency, the entailer could not make a valid entail of the Easter Hailes estate, and that as to that estate, it flowed *a non domino*, and, therefore, could have no validity.

There was an obligation in the entail, which the respondent specially founded on, as entirely superseding the appellant's claim, to this effect: "Declaring always, as it is hereby specially "provided and declared, and by acceptance hereof, the said "Alexander Gibson and his heirs male, whom failing, the "other persons substituted to him, as aforesaid, shall be bound "and obliged to satisfy and pay all my just and lawful debts "and funeral charges. Item, to fulfil and perform the *whole* "*obligations* prestable by me at my death." "Also, to make "payment of such sums and legacies as I shall think proper to "leave and bequeath." He left £10,000 in legacies, declaring that his moveable estate should be first liable, and failing it to pay the legacies, his entailed estate should be liable.

Sir John Carmichael succeeded the Earl as heir of tailzie. He completed his title as heir of entail, and of course took upon him the conditions and clauses in favour of third parties contained in that entail, whatever they were. Sir John also executed an ante-nuptial contract of marriage, and became bound to settle the whole estates comprehended in Lord Hyndford's entail, on the eldest son of the marriage, whom failing, upon the other substitutes in that entail, including the estate of Easter Hailes.

The appellant was the only surviving child and daughter of Sir John, and claimed as heir at law and of line of James Carmichael, W.S., her great granduncle, and passing by her own father, expede a general service to him.

The respondent succeeded to Sir John as heir of entail, and was served heir male of tailzie, and provision to his brother.

The present action having been raised by the appellant, it was met by one on the part of the respondent, to have it found that she was liable for the onerous deeds and obligations of her father, who was, at least, apparent heir, more

than three years in possession of the estate of Hailes, and bound to make up a proper title, in her person, in terms of the Act 1695, c. 24, to the said Easter Hailes, and re-convey the same to the respondent.

In law the respondent pleaded, that where a person accepts or takes benefit from a deed of settlement of any kind, which contains conditions and clauses in favour of third parties, and makes the same the title of his possession, he becomes personally liable to conform and make effectual the settlement in all its parts, so far as he has the power of doing it, and is completely barred from attempting any thing to defeat or counteract the settlement, or any part thereof. He may repudiate the settlement, if he chooses, *in toto*, but he cannot be allowed to accept of a part, and at the same time to shake himself loose of all the rest, and even to take steps for defeating it, and rendering it ineffectual.

The Second Division pronounced this interlocutor, which was unanimous: "Find that the late Sir John Gibson "Carmichael, by his acceptance of the estates of Skirling "and others, under the entail executed by the late John, "Earl of Hyndford, his granduncle, by the measures taken "by him in pursuance of that acceptance, and also by the "representation he incurred generally to the said Earl, con- "tracted a valid and onerous obligation to make up proper "and effectual titles to the estate of Easter Hailes, and to "subject the same to an entail, in the terms of that executed "by the Earl of Hyndford, of the estates of Skirling and "others; and that this obligation will descend on the pursuer, "the daughter and heir of line of the said Sir John Gibson "Carmichael, in virtue of the statute 1695, c. 24, whenever "she enters heir on the estate of Easter Hailes, to her great- "granduncle, James Carmichael: Find that the said Sir "John Gibson Carmichael endeavoured to implement the said "obligation, but that the titles expede for the purpose, labour "under defects which expose them to reduction at the in- "stance of the heir of James Carmichael, and that the de- "fender, Sir Thomas Gibson Carmichael, as heir under Lord "Hyndford's entail, is now in possession of the estate of "Easter Hailes, in right of the investitures thus expede: "Find that at common law the general service expede by the "pursuer to James Carmichael, affords her a sufficient title "in point of form, to challenge the present investiture in "favour of the said Sir Thomas Gibson Carmichael, and the "heirs of entail; but find, that as this title is only inchoated

June 27, and July 7 1809.

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" and intentative, and in some respects defeasible, so it affords " no security to the defender against subsequent challenges, " unless it is completed by an entry to the lands; and that it " carries no force sufficient to cut down the existing investi- " ture, except as it may become perfected by such entry; " and also find, that it is supported by no just and equitable " interest, that can authorize the depriving Sir Thomas Gib- " son Carmichael, and the heirs of entail, the creditors under " her father's obligation, of the titles of possession, which " they at present enjoy, unless employed for the just purpose " of entering, and so undertaking and implementing that " obligation. Therefore, on the whole, find, that the inves- " titure of the defender under challenge, cannot stand in the " way of the pursuer's entering to the lands and estate of " Easter Hailes; and declare it in so far ineffectual, and " reduce and decern to this extent accordingly; but find " and declare that the said infeftment and investiture chal- " lenged, must remain a valid and effectual title to the said " Sir Thomas Gibson Carmichael, and the heirs of entail in " their order, over the lands of Easter Hailes, aye and until " the pursuer enters thereon: and find, that on her so enter- " ing, she must surrender and convey the same, in competent " form, to the defender and the other heirs of entail of the " said John, Earl of Hyndford, and that in terms of the said " entail, and under the whole provisions, conditions, and " fetters therein expressed; and they decern accordingly; but " supersede extract till the first box day in the ensuing vaca- " tion; and, if a full reclaiming petition shall then be boxed, " supersede extract until the same be disposed of." On re-

Nov. 15, 1810. claiming petition, the Court again unanimously adhered.*

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* Opinions of the judges:—

LORD GLENLEE said,—" It was impossible to resist the conviction that this lady's father had come under a full obligation to implement the entail. And she, passing over her father, to take up an estate from a more remote ancestor, was bound to fulfil it."

LORD MEADOWBANK.—" As to the merits of the question, Sir John received the entailed estate as a gift, to which there was added a condition. Having taken the gift, he became bound to fulfil the condition. The trammels of the entail might have been disputed by him, but the condition could not. Sir John became bound by the contract *do ut facias*."

The other judges concurred in these opinions, and the judgment was therefore unanimous. *Vide*, also opinions in the Faculty col-

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant being the heir-apparent, and being served heir in general to James Carmichael in the estate of Easter Hailes, has a sufficient title to pursue in a reduction of the titles on which the respondent pretends right to that estate, and, indeed, the only title that an heir apparent, pursuing a reduction of an infeftment subsequent to that of his ancestor, could make up by service, since a special service on his part would be liable to the objection, that his ancestor was not the last infeft, agreeably to the style of the brief, claim, and verdict, in such special service.

In support of this proposition it may be observed, in the first place, that the general service to James Carmichael by the Earl of Hyndford, could form no objection to the general service of the appellant. A general service to a person dying infeft in heritable subjects, if not followed by special service and infeftment, has no effect whatever upon the situation of an heir subsequent to the person serving generally. It confers, indeed, a title to set aside such impediments as may obstruct an entry by special service and infeftment. But if the person who uses the general service dies, without proceeding to enter, his general service flies off, as if it had never existed, and the next heir intending to take up the subject, must connect himself with the person last vest and seised, without regard to the incomplete and ineffectual act of the intermediate heir. In heritable subjects which are not strictly feudal, that is, which do not admit of infeftment, the rule is different, as they are effectually transmitted by general service alone, but in regard to such there is no question here.

2d, The appellant's title, therefore, to sue being established, the merits of this reduction are perfectly clear. The titles of the respondent are manifestly bad; the Earl of Hyndford not having made up any title to the estate of Easter Hailes, could not effectually convey it by his entail. It was by the law of Scotland, not his property, and the entail, in regard to it flowing *a non domino*, was void. The entail being ineffectual, the precept of *clare constat*, granted to Sir John Gibson Carmichael, and the other titles of the respondent, are inept. These titles must, therefore, be reduced, and then the

lection. The above is taken from Hume's Collection of Session Papers.

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respondent has no right whatever of property or possession of the estate of Easter Hailes; his situation is just that of a mere stranger, having intruded into the possession, who must relinquish it to the heir-apparent of the person last infeft.

3d, Sir John Gibson Carmichael did *not* contract an onerous obligation to execute a subsidiary entail of the estate of Easter Hailes, in terms of the entail executed by the Earl of Hyndford. His obligation is said to have been incurred, 1st, By incurring a universal representation of the Earl, and thereby becoming liable to an obligation on his general representation to entail Easter Hailes; 2dly, By accepting the entailed estate, and other property of the Earl, under conditions imposing the obligation. 3dly, By homologating the entail of the Earl. The first proposition implies two things, 1st, That the Earl bound his general representatives to execute a subsidiary entail of Easter Hailes; 2d, That Sir John Gibson Carmichael incurred a general representation of the Earl. Both of these are erroneous. The first of these questions is, whether, in general, an entail of a subject held in apparency, creates an obligation upon the general representative of the entailer to acquire the estate, and execute a subsidiary entail of it? On this point it was submitted that there was no evidence, that in general a *legatum rei alienæ*, even although *res hæredis* ever was held sufficient in the law of Scotland, to constitute an obligation on the general representative of the testator to acquire and convey the thing. No authority or case to that effect has been quoted; and there appears nothing to exclude the operation of the general rule, that gratuitous deeds bear no warrandice, but convey the right *tantum et tale* as the donor or testator had it, and must be held *pro non scripto*, if he had no right to it, or no right of conveying it. But even if such authority could be quoted, that would not be sufficient to prove that an entail of a subject held in apparency, could have such effect. For, 1st, A testator legating *res aliena*, or *res hæredis* must naturally be presumed to have had in view, that the thing was not his own property, and to have executed the legacy *in that view*. For what, it may be asked, should make him think a thing his own, which belonged entirely to another person, and with which he had no connection? But an entailer conveying a subject to which he had not made up titles, may very easily be supposed to have understood that he had power to convey it, and to have conveyed it entirely in that view. For such mistakes regard abstruse matters in law, and are very

common. And farther, it is plain, that if he had known or contemplated his want of power, he would have cured it by making up titles himself. It is natural and reasonable, therefore, to think, that in this last case, the entailer had no contemplation whatever of his own want of power, and did not at all intend to constitute any obligation on his representative in that view. But if that be supposed, then, even independently of the strict constitution of deeds of entail, the entail of a subject in apparency can constitute no obligation on the representatives of the entailer *quia quod potuit non valuit.* 2dly, An obligation to entail is liable to the strictest construction by the law of Scotland. Supposing, therefore, that an entailer, of a subject held in apparency, could be viewed as having intention to constitute an obligation on his representatives; yet effect could not be given to such intention from want of certain and explicit expression. His deed must be strictly construed, and the maxim must apply *quod voluit non fecit.*

4. Besides, Sir John Gibson Carmichael did not incur a universal representation of the Earl by accepting the entailed estate of Skirling and other property of the Earl. He did not incur an obligation to execute an entail of Easter Hailes estate, and if such an obligation could be construed against him, it was only *in valorem* of the funds received by him. But all these the appellant offers to prove, were expended in paying legacies and debts of the entailer which it is not denied were preferable to any claim under the obligation to entail.

5. Supposing Sir John Gibson Carmichael was liable in an obligation to entail Easter Hailes, yet that obligation could not effectually pass against the appellant by the statute 1695, c. 24, even if the appellant had entered to the estate of Easter Hailes. The appellant is said to represent her father. But it is an undeniable fact that Sir Thomas Gibson Carmichael likewise represents the appellant's father, as heir in the entailed estate of Skirling, and although this representation may not subject him or the entailed estate, for Sir John's proper debts, yet it does most assuredly subject him to all debts and obligations flowing from the entailer. Now, the obligation in question is evidently of this last description, having been created by the entailer, and by him imposed upon himself and the whole aggregate body of heirs of entail. They are, therefore, the proper debtors in it. It is sufficient, therefore, to state that in regard to any obligation originating with the entailer, Sir Thomas Gibson Carmichael, the heir of entail now in

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possession, must be held as representing the late Sir John Gibson Carmichael.

Pleaded for the Respondent.—1. The general service of the appellant does not afford a sufficient title to deprive the respondent of the possession of the estate of Easter Hailes, unless it be followed up by a special service, as heir of James Carmichael, which would be altogether unavailing to the appellant.

2. Whenever she expedes a special service, which the respondent, as superior of the lands, could at any time compel her to do, she must immediately become liable to implement the onerous obligations incumbent upon her father, Sir John Gibson Carmichael, an intervening heir more than three years in possession, in terms of the Act 1695, c. 24. Now, Sir John was under an onerous obligation to make up a title to this estate, and convey it in terms of the entail.

3. He took up the whole estates, including Easter Hailes, provided to him by the Earl of Hyndford, under the entail executed by his Lordship in 1784, made up his titles as heir of tailzie, and possessed the estates under the entail for sixteen years; and he further, intromitted with the whole remaining property of the Earl, heritable as well as moveable, in virtue of a general disposition and conveyance executed by the Earl of the same date with the entail, which deeds were granted in his favour, under the positive condition imposed upon him by the granter, that he should hold these estates under the entail, that he should use every right or title which he might acquire thereto, in corroboration of the entail, and generally, that he should fulfil all the obligations prestable by the Earl at the time of his death, one of which was to entail the estate in question.

4. Sir John, having thus made his election, having accordingly, in his contract of marriage in 1779, come under an obligation to settle this estate in terms of the entail, having afterwards, in 1800, granted a procuratory of resignation, including this estate of Hailes, to the heirs called to the succession by the entail, and having, in short, *approbated* that deed in so many ways, was not entitled to *reprobate* it, by afterwards insisting on a reduction of the entail so far as regarded this estate.

5. The appellant is in this respect, in no better situation than her father: for, by passing by her immediate ancestor, who was more than three years in possession of the estate, she becomes immediately liable to all the onerous obligations

incumbent upon him, and, therefore, were she to succeed in reducing the present investiture so as to obtain possession of the estate, she is bound immediately thereafter to reconvey the estate to the respondent as heir of entail, under the conditions, provisions, and restrictions imposed by that deed, upon the maxim, *quia frustra petis quod mox es restiturus*. The appellant has, therefore, no interest to insist in the present action.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *J. H. Mackenzie, Fra. Horner.*

For the Respondent, *Wm. Adam, Sir Saml. Romilly, John Clerk, John Jardine.*

WILLIAM CUNINGHAME BOUNTINE CUNINGHAME GRAHAM, Esq. of Gartmore, Finlayson, and Ardoch, and ÆNEAS MORRISON, Writer, Greenock, Tacksman of the Fishings, . - - - } *Appellants;*

JOHN DIXON, Esq., present Provost of the Royal Burgh of Dumbarton, and the other Magistrates and Councillors of Dumbarton, for themselves, and as representing the Community thereof, - - } *Respondents.*

(Et è contra).

House of Lords, 19th June 1816.

SALMON FISHINGS—YAIRS—STAKE NETS.—(1.) In a dispute raised by mutual declarators as to the rights of salmon fishings, Held that both parties had established a right to a salmon fishing. (2.) The appellant's title bore reference to the fishings in these words: "cum piscatione de lie yair de Ardoch," and nothing was said about stake nets in the other's right, and stake net fishing being claimed by both parties, the appellants contending that yairs necessarily included and meant a stake net fishing. Held that neither party was entitled to establish any species of stake net fishing within the bounds in question. Affirmed on appeal.

The royal burgh of Dumbarton holds grants from the Crown of the salmon fishings of Clyde, from the mouth of the Kelvin, which is situated about ten miles above Dumbarton to the head of Loch Long, about twenty miles below Dumbarton. The burgh has likewise a royal grant of the

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river Leven, and the salmon fishing in it, which river is the outlet from Lochlomond, and enters the Clyde at a distance of about ten miles. Dumbarton Castle stands in the angle formed by the junction of the Clyde and Leven.

The respondents stated, that while thus possessing a right to the salmon fishings of the Clyde, from the mouth of the Kelvin to the head of Loch Long, yet that, on the other hand, some proprietors of the estates on the banks of the Clyde within the same bounds, held in their charters, grants of the fishings of particular yairs, which are low dykes of stone built within flood mark to detain herrings and other small fish that swim low in the water. Among these was the proprietor of Ardoch, the appellant. They stated, further, that the appellant had, by his ancient titles, a right to the fishings of the yair of Ardoch, which was an old stone fabric then in ruins. They alleged it was a herring yair, constructed in the form of a crescent, with the horns turned up the river. The respondents and their tenants having erected a yair in the form of a stake net on the shores of Ardoch, below that of the appellant, whereby, as the appellant stated, the fish approaching towards the appellant's yair were intercepted, he brought an action of declarator against the town of Dumbarton, which was met by another action of declarator on the part of the town, against the appellants, who had also proceeded to erect stake nets on the sands opposite to Ardoch.

The appellant Mr Graham's summons set forth his title to be to the lands of Ardoch, "cum piscatione *de lie zair* de Ardoch."

The respondents' titles conveyed "totum et integrum "dictum fluvium de Leven, a Balloch ad castrum dicti "burghi, cum piscationibus salmonum, et aliorum piscium, in "eadem; una cum libertate ejusdem, ex utroque latere ad "metas fluctuum maris; ac etiam libertatem dicti fluvii de "Clyde, *cum piscationibus salmonum aliorumque piscium*, "intra bondas prædict, viz., inter dictam aquam de Kelving "et caput de Lochlong; possidendo per eos, eorumque suc- "cessores, adeo libero sicut ipsi aut eorum predecessores, "easdem alioque tempore præterito possidebant."

The respondents, with respect to their right, stated that the above grant conferred on the town of Dumbarton, 1st, The river of Leven from Balloch to the castle of the said burgh, with the fishery of salmon and other sorts of fish in the same, with the freedom of the river on both banks to the sea. 2d, There was thereby granted 'the liberty of the said river Clyde,' that is, the freedom of navigation therein, along with the

other royal burghs. And 3d, The fishery in the Clyde of salmon and other fishes, between the water of Kelvin and the head of Lochlong, to be possessed as freely as their predecessors had done in past time. They further stated, that the charter founded on, ratified prior charters granted by Alexander II., who began his reign in 1213, David II., and James III. And under these, they contended that they had exclusive right of salmon fishing opposite to the lands of Ardoch, and that, consequently, they had a right to prosecute that fishery by means of stake nets. On the other hand the respondents contended, with respect to the appellant's titles, that these contained no grant of salmon fishing, and that they imported nothing more than the grant of a permanent fixture of known structure. In short, a yair in the form of a crescent, with the horns turned upwards, and consisting of a dike of loose stones of three or four feet in height, and only calculated to take herrings.

After a proof, Lord Meadowbank, Ordinary, pronounced this interlocutor in the mutual declarators:—"Sustains the "titles to pursue *hinc inde* in the mutual declarators, and "finds that the parties have thereby established a sufficient "right to the ancient grants respectively founded on. Finds "that the right to the yair of Ardoch, implies a right to every "sort of fishes that might be caught in such yair, whether "salmon or other fishes, and that a right to a yair confers "also a right to improve its form and capacity for taking "fishes in every lawful manner used in a fishing by yairs, "according to the skill and attainments of the time of fishers "by yairs. Finds that a stake net fishing adjusted to the "yair of Ardoch, is a fishing of the yair of Ardoch according "to the present practice of fishing by yairs. Finds no evi- "dence of the town of Dumbarton having exercised a right "of yair fishing, or having obtained any grant for that "purpose, or having acquired any right of salmon or other "fishing by the positive prescription, incompatible with the "right of Mr Bountine Cuninghame Graham, or of his "authors, to the yair of Ardoch, and that a possession of the "said yair sufficient to have prevented any such prescription, "has also been established on the part of the said Mr Boun- "tine Cuninghame Graham. Therefore, finds that the town "of Dumbarton has no right to establish a yair or stake net "fishing on any part of the shore of Ardoch, or to carry on "any species of salmon fishing there, by net and coble, or "otherwise, so as to demolish the yair of Ardoch or the

Dec. 3, 1810; in appellant's case, Dec. 3, 1811.

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" appurtenances thereof, or injure the said yair fishing, by any " operations carried on opposite to the shore of Ardoch, so far " as the Clyde is there rideable; decerns, and dispenses with " any representation." On representation, his Lordship ad- " hered, issuing the note below.*

Nov. 27, 1812.

These interlocutors were brought under the review of the Second Division of the Court who pronounced this interlocutor: —"The Lords having resumed consideration of this petition, " and advised the same, with the answers thereto; in terms " of the Lord Ordinary's interlocutor submitted to review, " sustain the titles to pursue *hinc inde* in the mutual " declarators, and find that the parties have thereby estab- " lished a sufficient right to the ancient grants respectively " founded on; *quoad ultra* recall said interlocutor; find that " neither of the parties are entitled to establish any species " of stake-net fishing within the bounds in question. Find " that Mr Graham and his tenant are entitled to repair and " uphold the yair of Ardoch, according to ancient usage, and " decern and declare accordingly." On another reclaiming

Jan. 16 and 19, 1813.

petition, the Lords found "that Mr Graham and his tenant " are entitled to repair and uphold the yair of Ardoch, and " according to ancient usage, to possess and enjoy the same, " and decern; and with this variation, adhere to the inter- " locutor reclaimed against, and refuse the desire of both " petitions."

The present appeal against these interlocutors, was brought by the appellants and a cross appeal by the respondents, in so far as the interlocutors were not sufficiently favourable to them.

Pleaded for the Appellants.—1st, Because the appellant, Mr Graham, and his ancestors have, from a period prior to 1560, down to the present time, possessed under express grants from the Crown, a right of salmon fishing by yair, on the shores of Ardoch. And though the respondents have adduced what they call right to the salmon fishings in the

* Note by the Lord Ordinary :—

" The points chiefly attended with difficulty, seem to the Ordi- " nary to be the right of converting an old yair into a modern " yair, by stake nets. This certainly requires the fullest con- " sideration of the Court; and the Ordinary conceives that his " interlocutor is little more than a proper step for such discussion, " as he followed, on pronouncing it, only the analogy of mills and " mill dams, and the like."

Clyde, under a charter from James VI., which ratifies charters of older dates, and the respondents have possessed such fishing on these titles up to the time when the new erections were made, yet none of the prior charters ratified by that of James VI. contained any title to salmon fishing in the Clyde, and, therefore, the respondents' right to salmon fishing in the Clyde, must entirely depend on the terms of that charter of James VI., which is of a date long posterior to the title produced by the appellants. By the charter of James VI., the freedom of the river Clyde, or the right of exacting toll or custom between the Kelvin and the head of Loch Long (which had previously belonged to the burgh), was confirmed and granted of new; but the grant of salmon fishing contained in that charter, is in express terms limited to the previous possession of the community. Nothing can be more preposterous than to maintain that the community, by that charter, obtained right to all the salmon fishings between the Kelvin and Loch Long, as nineteen-twentieths of the salmon fishings within these extensive bounds, were then, and have continued ever since, to be possessed by other proprietors, under grants from the Crown of a much more ancient date than those of the respondents. These titles are not solely confined to a fishing of the yair of Ardoch, but embrace a salmon fishing within the designation of yair fishing, unless otherwise restricted, and a grant of yair fishing from the Crown must necessarily convey a salmon fishing.

2d. By the law of Scotland, there is no regulation known by which the proprietors of yair fishings are restricted, as to the materials to be employed in the construction of a yair, or as to the shape in which the same may be formed. The Court have held stake nets to be a species of yair, and, therefore, not legal, where yairs are prohibited, but while here they have found the appellant entitled to a yair, they have, inconsistently with that finding, found him not entitled to a stake net fishing. A yair fishing includes a stake net fishing.

Pleaded for the Respondents.—1st, The respondents, by a charter from the Crown, followed by possession, have an exclusive right to the salmon fishings in the river Clyde, opposite to the lands of Ardoch. No party has a right to intrude upon that estate, which is lawfully vested in the respondents. 2d, The appellant, Mr Graham of Gartmore, has no right to a salmon-fishery in the river Clyde. He holds only a grant of the yair of Ardoch. This is merely a

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particular fabric. It never was a salmon-fishery, and cannot lawfully be converted into one, to the prejudice of the estate vested in the respondents. 3d, The appellant, Mr Graham, has no right, by his charter, to a particular *mode* or fashion of fishing. He has merely a right to a particular known fabric called Ardoch yair, or the yair of Ardoch. 4th, As Ardoch yair is an ancient and well known fabric, constructed for taking herrings and white fish, the stake net, which is a newly invented instrument for taking salmon, is not an *improvement* of this fabric, but a totally different instrument. 5th, The stake net constructed by the appellants for taking salmon, blockades the river Leven, and unduly injures the salmon fishery of that river. 6th, The stake net erected by the appellants, is an instrument which cannot lawfully be used for taking salmon in Scottish rivers.

On the cross appeal:—

1. The law of Scotland rejects popular actions. Mr Graham of Gartmore has no legal title, and no interest to complain of the mode in which the Magistrates of Dumbarton exercise their salmon fishery. He can lose nothing by their using a stake net, and it was not competent for the Court of Session to sustain any action or judicial process instituted by him or his tenant, for the purpose of interrupting or restraining the Incorporation of Dumbarton in establishing a stake net, or any other instrument which they could devise for taking salmon. 2d, Mr Graham of Gartmore has no right to alter the form or position of the yair of Ardoch. This ought to have been *declared* by the Court of Session in Scotland.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Sir Saml. Romilly, John Clerk, James Moncreiff.*

For the Respondents, *Wm. Adam, Ro. Forsyth.*

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[Fac. Coll., Vol. xvi., p. 429.]

WM. MOLLE, W.S., Trustee of the REV. JOHN EDGAR, Minister of the Gospel at Lymington, ... } *Appellant;*

WM. RIDDELL of Camiestoun, Esq., W.S., *Respondent.*

House of Lords, 19th June 1816.

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FEE OR LIFERENT — ALTERATION OF DESTINATION — NEGATIVE PRESCRIPTION—PAROLE TO CONTRADICT WRITING—MANDATE. 1st, Held that a destination to the grantor's daughter in liferent, and to the heirs-male of her body, whom failing, to the heirs-female of her body in fee, gave a fee to the daughter, and that she had power to alter, and had effectually altered the destination, though in a form, so as to create qualification for voting. 2d, Held, that the destination in the reconveyance of the *dominium utile* in 1779, must be held *presumptione juris* to have been authorized by, and the act of, Mrs Hunter, the daughter, and that parole evidence was incompetent to cut down that destination, or to prove the contrary. 3d, Held, that the service of Colonel Hunter during his absence abroad, was sufficiently authorized under the general commission held by the respondent to manage his affairs.

Richard Edgar, Esq. of Newton, stood vested in the estate of Newton. He had two sons, but they had predeceased him. His only daughter was married to Dr Hunter of Linthill in Roxburghshire.

Of this date, he executed a general disposition of his estate and effects heritable and moveable in favour of his daughter, Mrs Hunter, *and her heirs and assignees*, to take place at his death. Sept. 2, 1766.

In December of the same year, he executed a deed, settling his estate upon his daughter, Mrs Hunter, "in liferent, and "to the heirs-male to be procreated of her body, by the pre- "sent or any subsequent marriage; whom failing, to the "heirs-female of her body in fee; *whom failing, to my own* "*nearest heirs* whatsoever, also in fee, heritably and irredeem- "ably, &c." There was no revocation of the former deed of 2d September in this latter deed; and Mr Edgar died on 18th March 1767, following. Dec. 15, 1766.

After his death, Mrs Hunter and her husband made up titles to the estate of Newton, by special service and retour, of this date, neglecting altogether the personal deed of 1766, and serving herself as "nearest and lawful heir of her father." Upon this, she was infeft in the fee of the estate. April 30, 1767.

In 1779, Mrs Hunter and her husband having resolved to create freehold qualifications, upon their estates in Berwickshire and Roxburghshire, and to settle those estates of new, so that the fee of both estates should go together in the same channel, the respondent, Mr Riddell, who was the

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Doctor's nephew, and ordinary man of business, was employed in framing the deeds.

July 20, 1779. At that time they had four children alive, Richard Edgar Hunter, William Hunter, and two daughters.

Aug. 6, 1779. Of this date, the Doctor executed a procuratory of resignation of his estate of *Linthill*, upon which a Crown charter was expede, in favour of himself and *his heirs and assignees*. He then granted a feu right of the property of that estate to the respondent, Mr Riddell; and after having made a liferent disposition of as much of the superiority as created a vote in

Sept. 20, 1779. favour of another relation, Robert Riddell, he conveyed the

Sept. 21, 1779. remainder of it, which afforded a separate vote, to and in favour of himself in liferent, "and Edgar Hunter, his eldest "son, *and his heirs and assignees*, whom failing, to William "Hunter, his second son, and *his heirs and assignees*, heritably "in fee."

The deed of retrocession of the *dominium utile*, executed by the respondent of equal date with the last mentioned liferent dispositions, proceeded on the narrative of the conveyance of the feu of the property having been made to him in trust, and therefore reconveyed the same to the Doctor, in the precise terms, and under the same destination with that contained in the disposition of the superiority by the Doctor, to himself in liferent, and his two sons successively, *and their heirs and assignees in fee.*

In regard to Mrs Hunter's estate of *Newton*, the different deeds were made out in precisely similar terms, the reconveyance by the respondent Riddell, being "to and in favour "of Mrs Margaret Edgar *alias* Hunter, spouse of William "Hunter, Esq. of Linthill, physician, and to him, the said "William Hunter, and longest liver of them two, in con-"junct liferent, and to Edgar Hunter, their eldest son, *his* "*heirs and assignees*; whom failing, to William Hunter, their "second son, his heirs and assignees, heritably and irredeem-"ably in fee." Reserving full power to Mrs Hunter to dispose of her estate at pleasure, as if she had the "absolute fee "and property of this land." Upon this reconveyance infeftment followed.

These deeds, the respondent stated, were intended to accomplish, and did accomplish, not merely the political end of making votes, but the special purpose of changing the previous and original destination, and a perfect settlement of the estate of Newton at sametime.

The second son, and likewise the two daughters, survived

their father, the Doctor, who died in January 1781, but they pre-deceased Mrs Hunter, who lived till May 1792; and the eldest son survived both father and mother.

The respondent had been, while the children were under age, appointed tutor-at-law to them.

The charter expede by Mrs Hunter in 1779 had never been feudally completed *quoad* the fee, but only *quoad* the liferent.

The eldest son had thus a right to the superiority, and also a right to the *dominium utile*. He had gone into the army, and from him the respondent held two commissions, one for selling some detached parts of Linthill; the other for the general management of his affairs. In virtue of this last, in 1795, he expede a general service of Colonel Edgar Hunter, which had the effect of carrying the unexecuted precept in the charter, 1779.

After the death of the Colonel, (Mrs Hunter's eldest son,) the respondent was Dr Hunter's heir-at-law, and expeding a general service, he completed a title, and entered into possession of the estates both of Linthill and Newton.

The Rev. John Edgar is the grandnephew and heir of line of Richard Edgar, and having granted a disposition of the lands to the appellant, Mr Molle, who charged him to enter heir-of-line and provision to Mrs Hunter, and of provision to Colonel Hunter, thereupon obtained a decree of adjudication in implement against him. Whereupon the appellant raised the present action of declarator and reduction, concluding *alternately*, that it should be found and declared, that the destination of the estate of Newton contained in Richard Edgar's settlement in 1766 was not altered by any of the deeds executed by his daughter, Mrs Hunter, and consequently that Mr Edgar, the grantor of the trust-disposition to Mr Molle was entitled to the estate as heir of that destination; or if the deeds executed by Mrs Hunter, did import an alteration of her father's settlement, that they ought to be reduced or set aside by the Court, 1st, Because they were *ultra vires* of Mrs Hunter who had only a liferent to the lands. 2d, Granting Mrs Hunter's power to alter the order of succession, yet the destination in the reconveyance of the fee right, was inserted by the defender (respondent) without her authority; and 3d, Because the service of Colonel Hunter, as heir to his mother, was unwarrantably expede by the respondent.

The defences to this action were, 1st, That Mrs Hunter and her son, not having possessed the estate of Newton under the deed made by her father in 1766, but she having taken

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and made up title to it by a service as heir-at-law, and being thereupon infeft, and that being the radical title under which the estate was possessed for more than forty years before the present action was brought, the settlement, 1766, was cut off by the negative prescription, and an unlimited title established by the positive. 2d, That independent of prescription, and whether Mrs Hunter's title was to be ascribed to her father's deed, 1766, or to her service and infeftment, or to both, she was unlimited fiar of the estate, and had, as such, granted the deeds in 1779, which vested the superiority, or *dominium directum* of the estate in her, and her assignees simply, and the property or *dominium utile* in her, in liferent, but with all the reserved powers of a fiar; and in her son, the late Colonel Hunter, and his heirs and assignees in fee. That, as to the superiority, though, no doubt, if she had survived her son, or if she had died without making up a title, that superiority would have gone to her own right heirs as *in hæreditate* of her. Yet as the son survived her, and made up a complete title by his service as heir to her, the estate was no longer *hers* but *his*, and descended from him, not to those connected with him through the mother, but to his heirs *exparte paterna*, that is, to the respondent. And as to the property, or *dominium utile*, as she never exercised the reserved powers, her right was a mere liferent, and the fee was vested in her son, descendible by the terms of the investiture to his heirs; that is again (as he left no nearer heir, and made no settlement) to the respondent. And, 3dly, That the destination of the estate in the reconveyance of the feu right, was, in fact, inserted by the direction and authority of Mrs Hunter, and so must be held *presumptione juris*, nor would any proof to the contrary be now admitted as competent; and as to the service of Colonel Hunter, being expede without authority, the general commission the respondent held from him to manage his affairs while abroad, was a sufficient and good authority to authorize the agent to serve him heir.

Jan. 16, 1810.

The Lord Ordinary, Meadowbank, pronounced this interlocutor: "Having considered the representation for the pursuer, with these answers and the former proceedings, finds "that by the title made up under the former investiture, in "favour of Mrs Hunter, in 1767, the destination by the "settlement, 1766, was not altered; but finds that the new "investiture, 1779, accomplished by resignation and a new "charter in favour of heirs and assignees generally, and "transmitted to Richard Edgar Hunter, by general service

"to his mother, Mrs Hunter, is sufficient to supersede the "destination 1766, and agreeably to the brocard *Hæres hære-* "*dis mei est hæres meus*, to render the heir of line of Richard "Edgar Hunter, the heir of the investiture 1779. Of new, "finds it is sufficiently established that the said service by "Richard Edgar Hunter to his mother was authorized by "him, and that by his death without issue, the defender is "called to the succession by the investiture 1779, and *quoad* "*ultra*, adheres to the interlocutor represented against, and "refuses the representation."

On reclaiming petition the Court adhered.* On second reclaiming petition the Court adhered. Jan. 18, 1811. Dec. 13, 1811.

Pleaded for the Appellants.—1. Mrs Hunter had no power to alter the destination contained in her father's settlement, of date 15th Dec. 1766. The destination in the settlement 1766 was to and in favour of Margaret Edgar, "my "only daughter, and only child, now spouse to Dr William "Hunter of Linthill, *in liferent*, and to the heirs male to be "procreated of her body, by the present or any subsequent "marriage; whom failing, to the heirs male of her body in "fee; whom failing, to my own nearest heirs whatsomever, "also in fee, heritably and irredeemably."

Upon this destination it may be observed, 1st, That *ex figura verborum*, it conveys only the liferent to Mrs Hunter. 2d, It is an intricate tailzie, containing several very remarkable deviations from the ordinary course of succession. The first substitution is in favour of the heirs male to be procreated of Mrs Hunter's body, by the present or any subsequent marriage. If she had had issue of a *former* marriage, they would not have succeeded under this substitution, in which case, her *heirs-at-law* would have been excluded. The next substitution is in favour of the heirs female of her body, by which, if her sons by a second marriage had succeeded, their female issue, or sisters-german, might have been postponed to the daughters of Mrs Hunter's sons, by a first marriage, or to her own daughters by a first marriage. 3d, The last substitution is in favour of the grantor's own *nearest heirs* whatsomever, not the nearest heirs whatsomever of Mrs Hunter.

The question is, Whether Mrs Hunter, who succeeded under this settlement, had powers to alter gratuitously? That she had it in her power to sell or burden the estate

* *Vide* Opinions of Judges in the Faculty Collection, vol. xvi., p. 429.

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with onerous debts, may perhaps, be admitted. But the present is a very different question.

It is, no doubt, established by authorities and decisions, that rights taken to a father in liferent, and his children *nascituris*, in fee, import an absolute fee in the father, in a question with creditors and purchasers. This was the decision in the case of the children of Frog, Nov. 25, 1735, after a full argument.

Frog's Creditors v. Frog's Children, Mor. p. 4262.

Lawyers are divided with regard to the principle on which this doctrine has been introduced into the law of Scotland, a doctrine giving rise to the singular anomaly that the word liferent should, in certain cases, become synonymous with fee, to which, in technical language, it is opposed. The common opinion is, that it has been derived from the feudal maxim, *dominium non potest esse in pendente*, because, until the children were born to whom the fee was destined, there seemed to be no person but the liferenter, in whom the property could vest.

But, although it was decided in the case of Frog, and was previously understood to be law, that a right granted to a father in liferent, and to children *nascituris* in fee, vested a real fee in the father; this legal subtlety was not allowed to disappoint the will of the maker of the deed, where he expressly declared that the father's interest should be restricted to a liferent use without the power of disposal, or of subjecting the property to his debts. Therefore, in the case of Newlands against the creditors of Newlands, in which an estate was conveyed to John Newlands "during all the days of his "lifetime, for his liferent use *allenarly*, and to the heirs law- "fully to be procreated of his body, in fee," it was found that the father's creditors could not attach the estate, the word *allenarly* clearly indicating that the right in the father should be restricted to a naked liferent. The feudal difficulty in that case was got over, by supposing a fiduciary fee to be vested in the father for behoof of his children. The report bears that "a majority of the Court were of opinion, that, in "the present case, it is to be held *fictione juris*, that a fiduciary "fee was vested in Lieut. Newlands, but which substantially "is no more than a liferent, as it excludes the power of dis- "posal, either onerously or gratuitously." There are two cases, therefore, finally settled. If the grant is to the father in liferent, and to the children *nascituris* in fee, and if there is no express intention that the father shall be limited to a liferent use, then, in a question with creditors and purchasers,

he is an absolute proprietor, because there can be no restraints upon property by implication, when the interest of creditors and purchasers is involved. On the other hand, if there is an express declaration that the father shall be limited to a liferent, as, for example, if the grant is to the father in liferent *only*, and to the children in fee, then the feudal maxim is got the better of by the fiction of a fiduciary fee, and the estate is not affectable by the father's deeds, even in questions with creditors or purchasers.

2. But granting Mrs Hunter had power to alter the destination in her father's settlement, the deeds which she executed were not effectual to accomplish that alteration with regard to the *dominium directum*, or superiority of the estate. The Court of Session were unanimously of opinion that Mrs Hunter's service as heir of line to her father, did not alter the destination either of the property or superiority. But it is contended, that the charter passed in 1779, in order to separate the property from the superiority, and to confer a freehold qualification on the respondent, had the effect of altering the destination of the superiority, because the superiority is conveyed by that charter to Mrs Hunter's heirs and assignees. In support of this proposition, the respondent relied upon the authority of Stair and Bankton. Stair has said, "Tailzies also being constitute, are broken or changed "by the consent of the superior accepting resignation in "favour of other heirs, whether the resigner resign in favour "of himself, or his heirs whatsomever, or in favour of any "other, and their heirs." And the same doctrine is repeated by Bankton.

Stair, B. ii., tit. 3, p. 229.

B. ii., tit. 3, p. 583.

If Mrs Hunter had resigned in favour of heirs expressly different from the heirs in her father's destination, it might be admitted that, abstractedly from the special circumstances of this case, to be afterwards considered, the destination would thereby have been altered. But the first question is, whether by a resignation to heirs and assignees whatsoever, Mrs Hunter intended heirs and assignees different from those contained in her father's settlement.

The term "heirs whatsoever," often denotes heirs general, or heirs of line, but this is by no means its exclusive signification; nay, this is not its *technical* signification. So Lord Stair has laid it down. The term "heirs whatsoever," therefore, is the generic appellation, comprehending every species of heirs; and it may denote any one species by the addition of the differential sign, either expressed in words, or

Stair, B. iii., tit. 5, § 12.

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implied from facts and circumstances. Accordingly, the flexibility of this term has been insisted on by all our authors.

3. But, granting that the destination was altered with regard to the *dominium directum*, or superiority of the estate, and that this superiority must descend in terms of the charter 1779, to the heirs whatsoever of Mrs Hunter, construing that word in the ordinary sense of heirs of line, the appellant's constituent is the heir of that new destination, because the right under it was never habilely vested in Colonel Hunter. The respondent expeded a general service in favour of Colonel Hunter, as nearest and lawful heir to his mother. But this step was taken by him without any authority from the Colonel, unwarrantably and illegally, for the purpose of carrying into effect his own improper schemes. It therefore follows that Colonel Hunter must be held to have died in apparency, and Mr Edgar, the grantor of the trust bond, as Mrs Hunter's heir general, must succeed.

4. The Reverend John Edgar, the appellant's constituent, is heir under the reconveyance executed by the respondent of the *dominium utile*, or property of the estate.

5. The reconveyance executed by the respondent upon the 21st of September 1779 was framed in direct violation of his duty as trustee, unwarranted by the previous authority, and unsanctioned by the subsequent acquiescence of Mrs Hunter. Whether that lady had power to alter the destination in her father's settlement, and whether the deeds which she signed were calculated to effect that alteration, the respondent is bound by his own conduct from taking advantage of the new destination.

6. The respondent objected to the admissibility of parole testimony to cut down a written deed; but that was not the nature of the case here. The question was, whether the deed of reconveyance is the deed of Mrs Hunter or not, and whether she ever authorized its execution at all? Or whether, on the other hand, it was not unwarrantably palmed upon her for something totally different from what she understood it to be, or that the particular destination was wrongfully introduced? In such cases parole is perfectly competent.

Pleaded for the Respondent.—The respondent maintained, 1st, That the deed of 1766, independent of the objection of fraud to that deed, was lost by the negative prescription, and a contrary title established by the positive. 2dly, That Mrs Hunter being in the construction of law fiar, had complete power to alter the destination of that deed, and did so by the

operations in 1779; and, 3dly, That the appellant's attempt to contradict the deeds, as the act of Mrs Hunter, by parole evidence, is incompetent, and nothing relevant has been condescended on.

1. As to the plea of prescription, if it could be supposed that, by the deed, 13th December 1766, Mrs Hunter's hands were tied up in the manner contended for by the appellant, the obligation or *jus crediti* thence arising, would now be lost or extinguished by prescription, both positive and negative. Mr Richard Edgar died on the 18th of March 1767; and his daughter, Mrs Hunter, rejecting the settlement which he had made up, proceeded immediately after his death to make up her titles, not under that deed, but by a special service upon the preceding investiture. This she did on the 30th of April 1767, and it was completed by infeftment on the 4th of June of that year. Now the present action at the appellant's instance was not raised till the end of the year 1807, *i.e.*, forty years and eight months after the date of the special retour, and forty years and six months after the date of the infeftment. The respondent does, of course, maintain that even the positive prescription, counting from the date of Mrs Hunter's infeftment in June 1767, had elapsed before any effectual interruption was made by the appellant or his constituent. But supposing no *positive* prescription to have taken place, the obligation on Mrs Hunter to fulfil her father's deed, was lost by the negative prescription.

2. Independent of prescription, Mrs Hunter was absolute fiar of the estate under her father's deed, and she altered the destination by the deeds executed in 1779, in a way that has had the effect to carry the estate to the heirs-at-law of her son, though these are not her own heirs. It is a rule, as firmly established as any one can be, in the law of Scotland, that a fee of real estate cannot be *in pendente*, and therefore cannot vest in *heirs* who only take by service, where the succession opens to them. Where lands, therefore, are conveyed to one *in liferent*, and the heirs of his body, or heirs of any kind in fee, the nominal liferent is a real fee, or what, in the civil law, is called *usus fructus casualis*, for as the fee cannot be in heirs till they exist and are served, it must either remain with the grantor or pass to the grantee; that is, the person who, *ex figura verborum*, is liferenter. The former would be against the intention of the deed, but the latter is a most reasonable mode of settling the difficulty. Vested in fee, therefore, of the estate, it was quite competent

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Vide ante, vol. ii. p. 449. April 2, 1778.

for her to alter the destination in her father's settlement, and which she has competently, and in a fit manner, done, by the deeds of 1779.

To say that "heirs and assignees" in the termination of this deed of reconveyance, may refer to the heirs called by Richard Edgar's deed in 1766, is out of the question, and directly in the face of what was laid down in the noted case of Douglas, very similar to the present.

3. As to the charge or allegation, that the words of the deeds executed in 1779, which have had the effect to carry the estate to the respondent, were inserted by him without instructions from Mrs Hunter, and contrary to her intention, and the desire to be let into parole evidence to establish this, it is sufficient to say, that the respondent did everything by instructions from Mrs Hunter, assisted by her husband, though he cannot prove it, because the instructions were verbal, and still less can the contrary be proved. He need not dwell on the incompetency to change the legal import of a deed formally executed by parole evidence, or the danger of admitting it; as Lord Meadowbank, the Lord Ordinary, said in his note, "It would shake the title deeds of landed property to give "any countenance to the plea, that conveyancers, having a "contingent interest in settlements, were bound, on pain of "nullity, to produce separate authorities for the terms of the "deeds of their clients." It cannot be thought necessary to say more on this head than this.

4. As to the allegation that the respondent caused Colonel Hunter to be served heir to his mother, which completed his title to the superiority without his authority, this is totally unfounded. The respondent held a most explicit mandate, produced in the course of the service, and again produced in the present cause, for the step so taken.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun.*

For the Respondent, *Wm. Adam, W. Boswell.*

NOTE OF AUTHORITIES.

Appellant's Authorities.—No power to alter destination, Waddell *v.* Waddell, 6th January 1739; Mor. p. 8965. Moffat *v.* Moffat, 6th February 1724; Mor. p. 4321. Maclellan and Watson *v.* Meek,

2d and 3d November 1743; Mor. p. 4396. Lord Strathnaver *v.* Douglas, 2d February 1728; Mor. p. 15373; House of Lords affirmed, (*vide ante*, vol. i. p. 32). Urie *v.* Earl of Crawford, 17th July 1756; Fac. Coll. Lockhart *v.* Gilmour, 25th November 1755; Mor. p. 15404. Henderson *v.* Henderson, 20th January 1790; Fac. Coll. vol. ii. p. 185, *et* Mor. p. 4215. Elphinstone *v.* Elphinstone, 3d March 1803; Fac. Coll. vol. 18 (This reference doubtful). Gordon *v.* Maitland, 1st December 1757; Fac. Coll. vol. ii. p. 101, *et* Mor. p. 11161. Affirmed on appeal, (*vide* Paton's Appeal Cases, vol ii. p. 43). Lord Cathcart *v.* Shaw, 31st January 1755; Mor. p. 15558. Deeds executed not effectual to alter destination. Marquis of Clydesdale *v.* The Earl of Dundonald, 26th January 1726; Mor. p. 1262–75. House of Lords, Robertson's Appeal Cases, p. Skene *v.* Skene, 31st July 1725; Mor. p. 11354. Weir *v.* Steel, 7th February 1745; Mor. p. 11359. Burnett *v.* Burnett, 28th July 1765; Mor. p. 14939. Douglas *v.* Duke of Hamilton, 9th December 1762; Mor. p. 4358. Affirmed on appeal with variation, (Paton's Appeal Cases, vol. ii. p. 449). Rose *v.* Rose, 20th March 1784; Mor. 14955, *et* M. 5229. Reversed in the House of Lords; (Paton's Appeal Cases, vol. iii. p. 66). Blane *v.* Earl of Cassillis, 16th December 1802; Mor. p. 14447; (Paton's Appeal Cases, vol. v. p. 1. *et* p. 307). Parole inadmissible to affect writing. Wilson, 30th November 1744; Elchies, Fraud, No. 14. Moses *v.* Craig M'Lintock, 4th February 1773; Mor. 12352. Duke of Hamilton, &c., *v.* Douglas; House of Lords, March 1779; (Paton's Appeal Cases, vol. ii. p. 449).

Respondent's Authorities.—Liferent or fee. Maclellan *v.* Meek, 2d and 30th November 1742; Mor. 4396. Newlands *v.* Newlands, Creditors, 26th April 1798; (Paton's Appeals, vol. iv. p. 43). Lillie *v.* Riddle, 24th February 1741; Elchies, "Fiar," No. 7, *et* M. 4267.

[Dow., Vol. iv. p. 269.]

ARCHIBALD DOUGLAS, JAMES BLACK, LAURENCE CRAIGIE, and Others, Underwriters of the ship North Star, ... } *Appellants;*

RICHARD SCOUGALL and Co., Merchants, Leith, ... *Respondents.*

House of Lords, 17th May 1816.

INSURANCE—UNSEAWORTHINESS.—In effecting an insurance on a ship and freight, Held in the Court of Session that it was proved that the ship, on sailing on the voyage assured, was seaworthy. Reversed in the House of Lords.

An action was raised by the respondents, owners of the

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ship North Star, an old Dutch prize, under a policy of insurance on the ship and freight for £2100, from Leith to Pictou, in North America.

She had undergone a repair to the extent only of £280 before commencing her voyage, but at this time she was neither stript nor opened up in order to ascertain her internal condition, the repair being confined to her outward sheathing; but a certificate was granted certifying her staunch and strong for the voyage. Soon after she sailed she encountered a severe gale of wind; she made so much water that the crew could not keep her free with both pumps, and, in consequence, the master bore away for port, and brought her to Greenock.

Soon after her arrival the vessel was surveyed, and the surveyors reported her decayed in beams, breastwork, hooks, and knees; and that her iron work was, in general, decayed and gone.

Repairs were then made upon her to the extent of £1426, 9s. 3d., for payment of which sum the present action was brought against the appellants, the underwriters. Their defence was, that the ship was not seaworthy at the commencement of the voyage insured. Upon this a proof was allowed. The respondents adduced a certificate of the ship's sufficiency, signed by Messrs Strachan and Gavin, ship-builders in Leith, who had repaired the vessel before setting out on her voyage.

Mar. 10, 1807. Lord Hermand, Ordinary, pronounced an interlocutor, finding "the certificate of the ship-carpenters sufficient evi- "dence that the North Star was seaworthy when she sailed "on her voyage for Pictou, in North America," and therefore decerned. Thereafter, on reclaiming petition, a proof was allowed to both parties. This being reported with memorials, the Court adhered.

May 27, 1803.

On appeal to the House of Lords.

It was ordered and adjudged that the interlocutors complained of be reversed, and that the defenders (appellants) be assoilzied, and decern.

For the Appellants, *Sir Saml. Romilly, J. A. Park, James Moncreiff.*

For the Respondents, *Geo. Cranstoun, Robt. Thomson.*

ALEXANDER MOFFAT of Sundaywell, . *Appellant.*

ISABELLA MOFFAT, only child of the deceased Wm. Moffat, and her Curator *ad litem*, *Respondents.*

House of Lords, 19th June 1816.

REDUCTION OF DEED—PROOF—ADMISSIBILITY OF WITNESS—AGENCY—*Penuria testium.*—1. Circumstances in which deeds were reduced and set aside on the ground of incapacity, force and fear, and irregularities in the execution of the deeds. 2. Held that the objection stated to the admissibility of two witnesses on the ground of relationship (nephews) to the party adducing them, fell to be sustained. 3. Objection being stated to the admissibility of Anthony MacMillan as a witness, on the ground of agency, the same was repelled, in respect that there was a *penuria testium* on the matters in which it was proposed to examine him.

The late William Moffat, Esq. of Muirbrook, made a disposition of his estate, whereby he conveyed it to the appellant, excluding his daughter, the respondent.

Actions of reduction were brought by the respondents on various grounds, chiefly, 1st, That the late William Moffat having been seized with palsy, was ever afterwards weak in his mental faculties, easily persuaded, and liable to be concussed into the granting of deeds. 2d, That, in particular, he was compelled *vi et metu* of his brother, the appellant, to grant the deeds libelled on, by carrying him away from his own house to Sundaywell, and there getting him to grant the deeds. 3d, That the deeds were not signed in a proper manner. That his hand was led, and no notarial subscription attested these facts. 4th, That the deceased wished to revoke these deeds, but was prevented *vi et metu* of his brother, the defender. He had desired a friend to send him a man of business for that purpose, assigning this reason, that the deeds so granted had been granted through misrepresentation, force, and fear. The misrepresentation here alluded to was, that the respondent was not his child, but that she was begot while he and his wife were staying with a Mr Grierson.

A long proof was led, in the course of taking which, an objection was stated to the admissibility of Anthony MacMillan, a writer (who was adduced for the purpose of proving that, after the execution of the deeds sought to be reduced, the deceased had intended to execute a settlement in favour of the respondent, Isabella Moffat), on the ground that he had

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been employed by the respondents as the agent in the country, from the commencement of the process, and still continued to act in that capacity; and that he had made inquiries at many of the witnesses as to the evidence they could give in the cause; and that he had attended the examination of several of the witnesses. Mr MacMillan's examination *in initialibus* estab-

Feb. 21, 1811. lished these facts. The Lord Ordinary (Robertson) repelled the objection, "in respect he understands that Alexander "MacMillan has not been examined as a witness in the cause "generally, but merely as to the particulars stated in the "fifth article of the pursuer's condescendence, as to some of "which it is alleged there is a *penuria testium*." On the other hand, the appellant adduced Thomas and Robert Stott, his nephews, as witnesses, but the respondents objected to

Nov. 26, 1812. them on the ground of relationship and interest, and the Court unanimously sustained this objection on account of the interest.

Jan. 14, 1813. Upon the result of the proof, the Court were clearly for

Mar. 9, 1813. reducing the deeds, and pronounced judgment accordingly.*

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The late William Moffat of Muirbrook was absolute and unlimited proprietor of his estate and effects, and disposed of the same to the appellant by the dispositions dated 28th February, and 31st May 1802, which were executed by the said William Moffat, while of a sound and disposing mind, and according to the formalities prescribed by the law of Scotland. It is true that Muirbrook had been seized with a palsy some years before he executed the deeds in question, but it is not true that his faculties were impaired by the effects of disease. The proof which has been led in this case, demonstrates that the respondents' allegations are altogether unfounded, and that Muirbrook, at the time of executing the deeds under challenge, was not only of a sound and disposing mind, but was possessed of a judgment

* NOTE.—Opinions of judges:—

"The Court all refused a reclaiming petition, Lord Robertson only for Sundaywell. I went mainly on the evidence of weakness on the part of the testator, the powerful and sedulously sustained influence by the defender over him, and finally (not noticed in the petition), the preventing him from having an opportunity to alter the deed, which he seemed desirous to do."—*Lord Meadowbank's Session Papers.*

perfectly clear and unimpaired by disease. In judging of the evidence on the head of his capacity, it ought to be kept in view that he had always a determination to leave his property to some one or other of his relations, to the exclusion of the respondent. This resolution he often expressed. From an analysis of the evidence regarding the state of Muirbrook's mind, it appears that the respondents have scarcely even attempted to prove the slightest degree of incapacity, although upon this the foundation of their case was rested; while the evidence of the appellant on this subject is of the most decisive character. But, it is said, that the deeds challenged were procured by intimidation and undue influence, which the appellant acquired over him, and, therefore, that he was compelled *vi et metu*. If he had previously determined to convey his estate in the manner he did, that is, by excluding his wife's daughter, it could not be possibly necessary to use either undue influence or force and fear to make him do that, which, for years, he had resolved to do. But this is negatived in the most positive manner by the person who drew the deed, and the instrumentary witnesses, who declare that it was freely and voluntarily executed by him, after having been read over.

2d, Supposing it to be proved that the appellant had obtained a certain degree of influence over the mind of his brother, this would afford no relevant ground in law for setting aside deeds which the grantee had full power to execute, and which he actually did execute freely and voluntarily, and in sound mind.

3d, The evidence of Thomas and Robert Stott would have been extremely material to the cause, and these persons ought to have been admitted as witnesses. Although, in the general case, persons standing in the relation of nephews to a party have been incompetent, yet, where there is a *penuria testium* upon the point, the law relaxes that rule. Thomas Stott lived in the same house with Muirbrook, and Robert Stott was his medical attendant, and both were well qualified to speak as to whether undue influence had been used by the appellant.

Pleaded for the Respondents.—1st, That the deceased, when he executed the deeds under reduction, was labouring under a painful and most distressing disease, which impaired his mental faculties, and rendered him peculiarly subject to be swayed, intimidated, and concussed into doing whatever might be wished for by those who had the charge of him.

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He was completely under the influence of the appellant, as is proved by several witnesses, which influence was produced by fear, by persuasion, or the joint operation of both, of the appellant, in whose favour these deeds were executed.

2d, That he was kept in a state of imprisonment, from which he was anxious to get free. He was not permitted to see any person with the appellant's knowledge; and, in particular, that watch was put upon him, with strict orders to have the appellant instantly sent for, whenever the deceased should be seen speaking to a man of business.

3d, The deeds in question were, besides, made out by the agent, and under the orders of the appellant, and not of the deceased; that the appellant was present, and gave his directions when they were executed; and that the deceased, the grantor of the deeds, repeatedly and solemnly declared that he did not know their import, as is proved both by the depositions of numerous witnesses, and by the undoubted fact that he understood them to have been *mortis causa* settlements. The deceased was most anxious to alter these deeds, and that he was prevented from doing so, by the direct and personal interference of the appellant himself, at the moment when he had got a new settlement written out, ready for subscription, by which he intended to alter them.

4th, That the examination of Anthony MacMillan was admissible, according to the principles of the law of Scotland, but that it was incompetent to examine the Stotts as to the points proposed by the appellant.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *H. Brougham, R. Jameson.*

For the Respondents, *Francis Horner, Robt. Bell.*

NOTE.—Unreported in the Court of Session.

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MAXWELL, &c. v. GORDON.

[Dow., Vol. iv., p. 279.]

SIR DAVID MAXWELL of Cardoness, Bart., and Others, Heritors of the parish of Anwoth, in the Stewartry of Kirkcudbright, } *Appellants;*

ROBERT GORDON, Writer, Factor, appointed by the Reverend the Presbytery of Kirkcudbright, ... } *Respondent.*

House of Lords, 20th June 1816. 1816.

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CHURCH—PRESBYTERY'S POWERS TO ORDER THE BUILDING OF DO.—Held that the Presbytery's powers were rightly exercised, in ordering a new church to be built, and failing the heritors obeying that order, of proceeding themselves to get the church built, and decerning for the expense thereof against the heritors. Affirmed in the House of Lords, with a declaration.

A complaint having been made to the Presbytery of Kirkcudbright, of the insufficient and ruinous state of the church of the parish of Anwoth, they, after examining tradesmen as to that fact, decided that a new church was absolutely necessary. Although almost all the heritors of the parish were present, by themselves or agents, when this investigation and decision took place, the presbytery afterwards proceeding with all the regularity and form capable of being observed in such cases, repeatedly called upon the heritors to take the necessary measures for rebuilding the church, and to assess themselves in the expense; but the heritors having failed to do so, the presbytery, after various meetings, and much deliberation on the matter, were obliged to take upon themselves the exercise of the jurisdiction conferred upon them by the law of Scotland. They accordingly procured plans of the proposed church, and estimates of the expense of building it; they contracted with tradesmen, and got the church built; they then decerned against the heritors for the amount of the necessary sums, and payment having been refused, letters of horning were raised on the decree, on which the heritors were charged at the instance of the respondent, factor, appointed by the presbytery to collect the assessment.

A bill of suspension of the charge was brought on the ground, that the proceedings of the presbytery were not only precipitate, but altogether irregular and illegal;—That it was not within the province of the presbytery to interfere, but belonged of right to the heritors, and that on assessing the heritors for the amount, they had omitted to assess the feuars of the town proportionally, in terms of a former decision of the House of Lords.

The Lord Ordinary and the Court refused the bill.

Upon appeal to the House of Lords, the following judgment was pronounced.

It is ordered, that the interlocutors complained of, excepting in as far as the same relate to the allocation of the

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expenses of rebuilding the church be affirmed. And it is ordered, that, with regard to such allocation, and particularly the questions, whether such allocation ought to be made according to the real or valued rent of the persons liable to pay the same, and whether the feuars of the village of Gatehouse-of-Fleet are liable to such allocation, the case be remitted back to the Court of Session to reconsider these points, in case the appellants shall, within four months after the date of this judgment, apply to the said Court by petition for such reconsideration, the said Court, in the event of such reconsideration, having regard to the rule declared by the judgment pronounced by this House in the case of Peterhead, on the 24th June 1802; and it is further ordered, that in case the said appellants do not apply to the said Court within four months, as above directed, that the said interlocutors be, and the same are, wholly affirmed.

Ante, vol. iv. p. 356.

For the Appellants, *Sir Saml. Romilly, Fra. Horner.*

For the Respondents, *Wm. Adam, H. Brougham.*

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STEWART, &c. v. ELDER, &c.

HOPE STEWART of Ballechin, CATHERINE MERCER, Daughter of the deceased COLONEL MERCER and Others, heirs portioners of CHAS. and ROBERT MERCER of Lethindy, and Others, . . } *Appellants;*

Mrs ISABELLA ELDER, Spouse of the Rev. Dr GEORGE BAIRD, and Others, Representatives of the deceased WM. ELDER of Loaning, ... } *Respondents.*

House of Lords, 21st June 1816.

TRUSTEES FOR CREDITORS—LIABILITY FOR NEGLECT—FACTOR—RELIEF.—(1.) Held that trustees were conjunctly and severally liable to the creditors for neglect in not calling the factor appointed by them to account for his intromissions, by which the whole trust funds were lost to the creditors; (2.) Held that the acting or managing trustee was not entitled to claim relief against the other trustees, for the proportional amount found due to the creditors, in consequence of his liberating the factor, when apprehended, at the instance of the trustees on caption, without the consent of the other trustees. Affirmed on appeal.

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An action was raised by the appellants for relief, to a proportional extent, of certain sums, which the late Mr Charles Mercer of Lethindy had been found liable in, as one of the trustees appointed by a body of creditors, against the representatives of his co-trustees.

It appeared that a tenant on one of Mr Mercer's farms had become bankrupt. A meeting of his creditors was called, at which a full state of the tenant's affairs was laid before them, whereupon they appointed four trustees, of whom Mr Charles Mercer of Lethindy and William Elder were two, to manage that year's croping, to sell the stock and stocking, and after paying the preferable claims of rent, to divide the balance among the creditors.

The trustees were instructed to appoint a factor. They did so accordingly, by appointing Mr Crockat, who entered upon his office, recovered the funds, but failed to account either to the trustees or the creditors for the same. Indeed, no demand was ever made in the way of diligence by the trustees for the creditors against Crockat, for a long period of years, while he, in the meanwhile, had fallen into a state of hopeless bankruptcy.

An action was then brought by the creditors, against the surviving trustees, for accounting and payment of their debts, which process ended in decree in favour of the creditors, declaring that the fund for division, after deduction "of hypo- Jan. 20, 1803.
"thec rents due for the farm of Gowrdie to Mr Charles "Mercer, the proprietor, servants' wages, and other ex- "penses, amounted, with interest, at Candlemas 1802, to "£763, 5s. 10d.," and holding the trustees, as well as the representatives of those who were dead, conjunctly and severally, liable to pay the same. Under this decree, the appellant, Catherine Mercer, as representing Charles Mercer, was charged by horning to pay the amount; and having paid the same, she thereupon raised the present action against the respondents, as representatives of William Elder, one of the deceased trustees, and against the representatives of John Scott of Logie, to make good their proportional share of this loss.

The defence stated to this action was, that Charles Mercer of Lethindy took the chief management as trustee. That he took the chief superintendence of the factor, Mr Crockat's actings and intromissions; that he corresponded with him, urging an account of his intromissions; and that he had actual intromissions himself with the estate. That when the trustees were going to imprison Crockat in 1785, by his inter-

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ference, this was prevented, as well as the compulsitor used to compel him to account, thwarted. They also stated the defence, that David Dow and Andrew Stirton, who were also trustees, were not called to the action, but this defence was repelled, "in respect that there is no clause in the trust-"deed declaring the trustees *not* liable for one another."

The Lord Ordinary (Hermand), thereafter pronounced this interlocutor:—"Finds that this is an action brought by the "representatives of Charles Mercer of Lethindy, one of the "trustees for the creditors of Charles Stewart at Lethindy "Bank, a tenant upon the estate of Lethindy, to recover a "portion of the sums for which decree was obtained against "the said trustees in the year 1796, and which sums were "paid by the pursuers: Finds that the factor, John Crockat, "named by the trustees, acted chiefly by the advice and "under the direction of Charles Mercer, who, after he had "been apprehended upon caption, ordered by Mr Elder and "Mr Scott, two of the trustees, was liberated by order of the "said Charles Mercer, who, it is said, became cautioner in a "bond of presentation for him: Finds, that by so doing, he "is to be considered as having relinquished any claim he "might have had against the defenders and other trustees. "Sustains the defences, assoilzies the defenders (respondents), "and decerns."

Jan. 20, 1813. June 10, 1813.

On the reclaiming petition to the First Division of the Court, the above interlocutor was adhered to. A second reclaiming petition was also refused.

Against these interlocutors the present appeal was brought to the House of Lords by the appellants.

Pleaded for the Appellants.—1st, It is indisputable, that by the terms of the minutes of the creditors, which appointed the trustees on the bankrupt estate of Charles Stewart in 1775, and of the trust-disposition to these trustees granted in the following year; they became, conjunctly and severally, liable to the creditors for performance of the duties of their office, and to account for all intromissions, and to satisfy all legal claims that might arise from omissions or negligence in discharge of the trust. Accordingly, by the first interlocutor on the merits, the Lord Ordinary repelled the defences, "in respect there is no clause in the trust-deed, declaring the "trustees not liable for one another." And in so far as respects the constitution and conditions of the trust, and the original responsibility of all the trustees to the collective body of the creditors in the first instance, and to each other in

relief, there can be no doubt that this *ratio decidendi* was well founded.

2d, It is not less clearly established from all the evidence, that the whole trustees so named, did accept and act. In particular, it appears from the whole tenor of the proceedings, that William Elder of Loaning, whom the respondents represent, did take a leading part in all that was done respecting the affairs of the bankrupt estate, both during the life of Charles Mercer of Lethindy, whom the appellants represent, and also after that gentleman's death in the year 1789.

3d, There is no proof to show that any of the trustees got possession of any funds or money belonging to the bankrupt estate, which fell to be divided among the creditors. The decree of the Court of Session against the trustees, pronounced in the year 1803, which has been quoted, while it found the whole surviving trustees and representatives of those deceased, "conjunctly and severally" liable to all and each of the creditors, modified the sum of expenses awarded against them, on the ground expressly assigned as the *ratio decidendi*, "that it has not appeared that any of the trustees "were guilty of a wilful abstraction or misapplication for "their own advantage, of any part of the common debtor's "funds, the great losses upon which were occasioned by "the mismanagement *and failure* of a person whom they "unluckily appointed to be their factor, and *for whose intro-missions* they have been subjected." As to Mr Mercer in particular, it has been shown, that he did not even obtain payment of a great part of the rents, upon which he was a preferable creditor, by virtue of his hypothec, and which the creditors had given their consent by their minutes, should be paid to him by any two "or more" of the other trustees, from the proceeds of the crops and stock of the farm which the bankrupt had held. It also appears, that one, at least, of the trifling payments which he did receive to account of these rents, was, in obedience to this direction of the creditors, actually made by his colleague, Mr Elder, and that all the rest but one were made by John Scott of Logie. But it is to be presumed, that Mr Elder and Mr Scott made these payments out of the money they had collected from the produce of the farm. No account, however, either of Mr Elder's or of Mr Scott's intromissions, has been rendered.

4th, Although William Elder of Loaning, and John Scott of Logie, when convened in the original action before the Sheriff of Perth, in the year 1792, at the instance of John

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Butler and other creditors, did at first deny their responsibility as trustees, they afterwards abandoned this defence, and attempted to recover the funds of the bankrupt estate out of the hands of John Crockat, their factor, by personal diligence; and through the whole course of the subsequent litigation, both in the Court of the Sheriff and in the Court of Session, they pleaded upon the footing that they had been equally responsible with Mr Mercer to the creditors, while they maintained that no loss had been incurred by the creditors through the fault of any of the trustees, and that all the intromissions of the trustees had been fairly accounted for.

5th, The debt due to Mr Mercer was much larger than that due to any of the other trustees, and, accordingly, he appears to have been more solicitous and urgent than any of his colleagues in the trust, to obtain a settlement and division of the funds, by bringing Crockat, the factor, to account.

6th, The interference of Mr Mercer, in conjunction with his colleague, David Dow, on the 8th December 1785, to direct Allan, the messenger-at-arms, who had apprehended Crockat upon the decree taken against him by the trustees, not to carry him immediately to prison, if he lodged a bond with a cautioner, to present himself, with his accounts, on the 28th of that month, at the place appointed for a meeting of the trustees, was not calculated or meant to prevent or delay a settlement, but to obtain one. Accordingly, both the creditors and the other trustees, always regarded this measure in that light, and the caption was not put in execution by the other trustees, after the 28th of December, when the bond of presentation expired, if Crockat gave one. It is quite clear that Mr Mercer was not himself cautioner in any bond of presentation for Crockat, as the interlocutors have erroneously assumed. It is not less clear that no advice or instruction given by Mr Mercer at any time, could have a tendency to prevent Crockat, the factor, from accounting to the trustees, and paying over to them the funds of the bankrupt estate, as these interlocutors have likewise erroneously assumed; because, to make Crockat account, was the very object of all that Mr Mercer did in the business of the trust from first to last, whether the course which he took to accomplish his purpose, was judicious or not. Besides, the other trustees were informed immediately of what Mr Mercer and Mr Dow did; and as to the bond of presentation in particular, were

called upon to judge for themselves by intimation of that measure, at the time he and his colleague, who was upon the spot, gave their consent to it.

7th, The decree of the Court of Session pronounced in the year 1803, found the whole trustees and their representatives conjunctly and severally liable to the creditors for the dividends severally due to each of them from the bankrupt estate, without reserving any objection to the claim of relief which might arise in the case which has occurred, of one being compelled to pay for the whole, because no intimation was given of any such objection. By personal diligence on that decree, the appellants were compelled to pay the creditors, and their right of relief as constituted by that decree, is sufficiently instructed and fixed by that decree, which has been regularly assigned to the appellants.

Pleaded for the Respondents.—In considering the matter at issue in this appeal, it is to be kept in mind that this action is very different from one at the suit of the creditors against the trustees; the whole trustees were liable *singuli in solidum* to the creditors, not only for the intromissions but for the neglects of each other. But, in a question of relief, it is still competent for any trustee to show that the neglect, on account of which the trustees were jointly found liable, ought to be imputed to some one of his colleagues, and not to himself.

The first question that arises is, whether the decree in the former action against the trustees be, or be not, conclusive also in the present action of relief, at the instance of the representatives of one trustee against the representatives of another? But it is quite obvious from the nature of the former action, that no judgment pronounced therein, could operate as a *res judicata* in the present. In the former action, it was the object of the trustees to get free of their responsibility altogether, and not to affix that responsibility upon any one of their number. It is to be noticed, too, that after Mr Mercer's representatives were called as parties, no further appearance was made either for Mr Elder or Mr Scott; and Mr Hagart (one of the present appellants, and an executor of Mr Robert Mercer), prepared the pleadings in the cause as counsel for the defenders. In these circumstances, it is not to be expected that anything would appear in the defences of that former action, fixing any special responsibility upon Mr Mercer's representatives. The decreet in the former action, merely decerns the trustees, conjunctly and severally, to pay certain sums to certain

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creditors of the common debtors. The same decree would have been pronounced if any one of the trustees had appropriated the whole of the trust funds; though it is obvious that this trustee never could have maintained an action of relief against his co-trustees.

Conceiving, therefore, that the former decree cannot be founded on as a *res judicata*, the next subject of inquiry is, if the representatives of Mr Charles Mercer are not barred *personali exceptione* from maintaining the present action.

It distinctly appears in this case, that Mr Mercer took the chief direction in regard to Mr Crockat, the factor; when Crockat was pressed by the other trustees to come to a settlement, he uniformly applied to Mr Mercer for his interference, to screen him from legal prosecution, and from rendering his accounts; though it might be difficult, from what is known of the *general tenor* of Mr Mercer's conduct, to charge him with the sole consequences of the neglect of the trust concerns; yet what happened after Crockat's arrest, appears to the respondents to be conclusive against the appellants.

It is certain that Mr Elder did not interfere in the general management of Mr Crockat, and that he referred the matters of detail to the sole control of Mr Mercer; yet, when the decisive steps of suing Crockat, and arresting him upon ultimate diligence, were adopted, it appears that these were the exclusive acts of Mr Elder, necessarily taken in the names of the whole trustees, but almost without the knowledge of Mr Mercer.

Mr Mercer personally took no interference in the measures previous to the execution of the caption against Crockat; but Crockat, as usual in all cases of difficulty to himself, immediately applied for relief to his friend, Mr Mercer; accordingly, after the caption was executed, Crockat was liberated by the separate act of Mr Mercer and Mr Dow; it must follow as a necessary consequence from this act of theirs, so imprudent in itself, and so much against the interest of the trust, that in so far as the other trustees were interested, they thereby took the whole responsibility upon themselves, unless it can be shown that this act was homologated by their co-trustees.

It is not pretended that Mr Elder attended any subsequent meeting, nor is there any evidence that he afterwards interfered in the management of the trust affairs; it appears from the letters written by his son, Provost Elder, that he considered himself to be relieved from all responsibility, in

consequence of Mr Mercer's interference, to prevent the execution of the diligence against Crockat, and, in the Court below, the respondents challenged the appellants, to condescend upon any one instance, in which Mr Elder, after this period, had acted as a trustee. It was urged in the Court below, that Crockat, at the time of his arrest, was unable to pay up the balance which he owed, and that no good could have resulted from carrying the diligence against him into full effect; but it is impossible, at this distance of time, to ascertain if these averments be well founded or not; it is certain that even at that time, a great part of the money was still uncollected by Crockat, and one effect of enforcing the diligence would have been, at least, to procure production of his accounts, with the bills and other documents then in his hands. Another advantage would have accrued from carrying the diligence against Crockat into effect. It would have acquitted the trustees from the charge of negligence, the sole ground on which they were found liable personally to Mr Stewart's creditors.

But, in the last place, there is evidence in the cause, that Mr Mercer himself received and appropriated some part of Stewart's funds. It is not known to what amount this was, but it appears from the letter of Provost Elder to his father, already stated, that "Crockat told Allan" (the messenger who arrested him), "and *showed him by his accounts*, that Mr "Mercer and Mr Logie had all the money collected by him "except £20." Though there be no further evidence to show that Mr Mercer's intromissions were to that extent, the statement is rendered very probable by the letter from Mr Mercer to Mr Scott of Logie, of 2d April 1785. Hence it is quite uncertain to what extent he could, in any view, have relief from his co-trustees; and under this uncertainty, the present action cannot be maintained.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Leach, Jas. Simpson.*

For the Respondents, *Sir Saml. Romilly, James Keay.*

NOTE.—Unreported in the Court of Session.

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LAWRIE, &C. v. LIVINGSTONE.

JEAN LAWRIE, AGNES GILLESPIE, and THOMAS MENZIES, Heirs Portioners in General, served and retoured to the deceased Richard Burn of Clarkston, } *Appellants;*

ALEXANDER LIVINGSTONE of Parkhall, . *Respondent.*

House of Lords, 24th June 1816.

POSITIVE PRESCRIPTION—NULLITIES IN TITLES—ERROR IN DATE, &C.—Objections were stated, by a party claiming an estate, to the titles as null and void, and other reasons of reduction; held these objections to be barred after prescriptive possession of forty years.

The estate of Clarkston belonged formerly to the ancestors of the appellants.

In 1699 James Burn owned the estate. He had two sons, Richard and John, the eldest of whom succeeded to the estate. Richard Burn married Margaret Livingstone, a daughter of the family of Parkhall, and from whom the respondent is descended. She, on her marriage, was provided with the liferent of one half of the estate.

Richard Burn was much in debt, and Sir George Warrender of Lochend, after doing personal diligence, acquired a decree of adjudication of the lands of Clarkston, for the sum of £94, 1s. 8d. Richard Burn was also indebted to his brother John, and had granted to him, an heritable bond over the estate, for one of the two debts owing to John. To both of these debts Mrs Burn afterwards acquired right by disposition and assignation, in favour of trustees for her behoof; and she also acquired right, by disposition and assignation, to the debt and adjudication vested in Sir George Warrender, by paying him the sums therein, taking the right as above mentioned in favour of Mr James Monteith, and Alexander Mitchell, trustees for her behoof.

She, by the portion given her by her father paid off other debts, acquiring right to them in the manner above-mentioned. Richard Burn afterwards granted her a deed corroborating the rights so acquired, and, at the sametime, granted her the liferent of the *whole* estate of Clarkston, upon which
1733. she was infeft. Richard Burn died soon after this infeftment, without issue.

John Mitchell, afterwards Livingstone, son to the above Alexander Mitchell, and nephew to Mrs Burn or Margaret Livingstone, had acquired right to other debts contracted by

Richard Burn, to an amount far exceeding the value of the estate. In 1735 Mrs Burn, with consent of her trustee, conveyed these lands to the said John Mitchell.

John Burn, the brother of Richard, who knew well the circumstances of his brother, did not, after his brother's death, make up any titles to the lands. He died in 1752, leaving three daughters, Margaret, Jean, and Euphemia, who were entitled to the lands after paying these debts if any reversion remained over.

Margaret married John Lawrie, by whom she had one son, John.

The mode of procedure adopted in 1761, was to obtain a ratification of these debts held by Mr Mitchell, by these heirs, together with a renunciation of all their rights, in favour of John Mitchell. This he made the foundation of a decree of constitution as to the debts other than those due on Sir George Warrender's adjudication. This was followed up by special charge and decree of adjudication. Thus, Mr Mitchell, who, by entail afterwards succeeded to the estate of Parkhall, and assumed the name of Livingstone, had two adjudications vested in him, and obtaining charter of adjudication, he was afterwards infeft of this date. 1768.

He settled his estates, and among others the lands of Clarkston, upon Thomas Livingstone, his son, by strict entail; 1788. and upon his death the respondent succeeded as substitute under that entail.

The present action of reduction was brought by the appellants to set aside that right on the following grounds:— 1. That the adjudication laboured under an intrinsic objection and nullity, inasmuch as in the conveyance granted by the said Sir George Warrender to James Monteith and Alexander Mitchell, as trustees for the behoof of Margaret Livingstone, there was a palpable error: for the date of the conveyance, as narrated in the instrument of sasine in favour of the said John Mitchell, is said to be the fifth April "*One thousand and "twenty,*" in place of One thousand seven hundred and twenty. 2d. That the said John Mitchell, in place of taking a conveyance of Sir George Warrender's debt from James Monteith and Alexander Mitchell, as trustees for behoof of Margaret Livingstone, took a conveyance from Margaret Livingstone herself, and the conveyance thus deduced was, therefore, inept. 3d, That William Mure of Caldwell, one of the Duke of Hamilton's factors, who signed the charter of adjudication, was, in the instrument of sasine following thereon, described

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only as William, the name Mure being omitted. 4th, And it will also appear that, on a just accounting had with those who uplifted the rents, that these debts are extinguished and paid.

The defence stated to this reduction was, that the deed of renunciation was a complete title to exclude. And the respondent also produced his charter and sasine on which he founded the plea of the positive prescription; and he maintained, besides, that the claim of the respondent was barred by the negative prescription.

May 4, 1811. The Lord Ordinary, Armadale, pronounced this interlocutor:—"Having considered this condescendence, with the "answers thereto, and titles produced, finds that the charter "of adjudication in 1766, and instrument of sasine thereon "in 1768, form a sufficient title for pleading the positive "prescription in favour of the defender, and giving him an "exclusive right for ought yet shown: Finds that the diffe- "rent objections thrown out in the long paper, for the "pursuers, appear to be insufficient, groundless, and in some "particulars totally irrelevant after the positive prescription "upon charter and seisin, and possession has followed for forty "years; and, moreover, that the pursuers have not shown "any sufficient or proper title, as yet, to insist in this reduc- "tion, and, from the detail given in the papers, that their "predecessors, if they had originally any right, are, inde- "pendently of the plea of the positive prescription, cut off, "both by voluntary and judicial proceedings; therefore, upon "the whole circumstances of the case, and as it is not disputed "that the defender and his predecessors have been in the "uninterrupted possession of the subject in question, originally "very trivial and of little value, for upwards of forty years, "upon a sufficient title, sustain the defences, assoilzies from "the present action, and decerns." On reclaiming petition,

June 2, 1812. the Court pronounced this interlocutor:—"Alter the Lord "Ordinary's interlocutor, in so far as it finds the pursuers "have produced no proper title to insist in this action, but, "*quoad ultra*, adhere to the interlocutor reclaimed against, "and refuse the desire of the petition. Further, find the "pursuers liable to the defender in expenses; appoint an "account thereof to be given in to this Court; remit to the "auditor to tax it and to report." On advising another petition,

June 30, 1812. the Court were unanimous in adhering.

Against these interlocutors the appellants brought an appeal to the House of Lords.

After hearing counsel,

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It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Clerk, Thos. W. Baird.*

For the Respondent, *Geo. Cranstoun, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

[Dow's Reports, vol. iv., p. 97.]

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REID, &C. v. HARVEY, &C.

JOHN REID AND COY., Merchants in Glasgow, *Appellants;*

ROBERT HARVEY, ANDREW M'MILLAN and Others, all Underwriters on the Ship "Nancy," and ANDREW STEEL, W.S., *Respondents.*

House of Lords, 24th June 1816.

INSURANCE—CONCEALMENT—RUNNING SHIP.—In effecting an insurance on the cargo of a ship; held, that having concealed that the ship was a prize ship going home for condemnation, and not a British bottom, and that she was not to go with convoy, but to make a running voyage, the insured were not entitled to recover. Affirmed in the House of Lords.

Insurances were effected by the appellants on a cargo of fruit per the ship "Nancy," from Lisbon to Clyde, premium ten guineas, to return five per cent. *for convoy and arrival.*

On the same day that the appellants effected this insurance, they had received information by letter, stating that the "Nancy" was a ship going home for condemnation, and that she was a running ship, to sail without convoy, but these facts they concealed from the respondents at the time they insured. Five days after sailing she was taken by a Spanish privateer, and carried into Vigo; and the respondents refused to pay in consequence of the concealment of these material facts.

After various procedure in an action brought on the policies, the Court sustained the defences as to the concealment of these two facts, and assoilzied the respondents. And June 27, 1812.
on two reclaiming petitions they adhered. June 25, and July 1, 1813.

Against these interlocutors the present appeal was brought.

After hearing counsel,

The House of Lords affirmed the judgment of the Court of Session.

For Appellants, *J. A. Park, Jas. Wedderburn.*

For Respondents, *Sir Saml. Romilly, John Dickson.*

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HENDERSON v. SELKRIG.

WM. HENDERSON, Trustee on the Sequestrated Estate of Francis Garbett and Co., late Merchants at Carron Wharf, and of Charles Gascoigne, one of the partners of that Company as an individual, . . } *Appellant;*

CHARLES SELKRIG, Trustee for the Creditors of Messrs Adam and Thomas Fairholme, *Respondent.*

House of Lords, 27th June 1816.

CONTRACT—POWERS OF TRUSTEES ON BANKRUPT ESTATE.—A Contract entered into by the Trustees on a bankrupt estate, with concurrence of the creditors, was held not reducible, on the allegation (not proved) that it was entered into without due authority, and to the hurt of the creditors. Affirmed as to this. *Quoad ultra*, the case remitted.

Francis Garbett and Charles Gascoigne carried on business as merchants, at Carron Wharf, for some years previous to 1772, under the firm of Francis Garbett and Company.

In 1769 Mr Gascoigne entered into a transaction with Mr Ludovick Grant, then trustee for the creditors of Messrs Adam and Thomas Fairholme, by which he purchased, on his own private account, a debt due by the Carron Company to Messrs Fairholme, and a quantity of Carron stock or shares which belonged to them. Mr Gascoigne in return, gave a bond subscribed by himself, by Mr Francis Garbett, his partner, and by Mr Samuel Garbett of Birmingham, by which they bound themselves, conjunctly and severally, to pay to Mr Grant, on the 30th June 1773, the sum of £11,024, 2s. 6d., and the farther sum of £11,927, 2s. 6d., on the 30th of June 1775, with interest from the respective terms of payment. The bond contained also a disposition by Francis Garbett and Charles Gascoigne, of their lands of Abbotshaugh, and by the latter of his lands of Fullershaugh, in further security, in which lands Mr Grant was in consequence duly infeft.

Before the first of these instalments in this heritable bond became payable, the affairs of Mr Gascoigne, and of Francis Garbett and Company, had fallen into disorder, and their respective estates were, in June 1772, sequestrated by the Court of Session. Mr George Home, W.S., was appointed factor. At the first meeting of the creditors, Sir Thomas Hallifax and Thomas Stevenson of London, and Alexander Ferguson of Craigdarroch, were chosen trustees for managing

both the estates of the company and of the individual partners. Mr Gascoigne was allowed to act under them.

When the first instalment of the bond fell due, diligence of horning was raised, and arrestments used in the hands of the Carron Company, so as to attach the stock or shares held by either Francis Garbett and Company, or belonging to Charles Gascoigne, or to Francis Garbett, the individual partners, or to Samuel Garbett, the other obligant.

It was stated by the appellant that Mr Grant and his constituents knew well that these arrestments could not avail in giving a preference. The Carron stock, he stated, belonged to Francis Garbett and Co., and that of Mr Gascoigne, as an individual, could not be affected at all, in consequence of the previous sequestration. *That* of Francis Garbett, supposing it to be covered by the sequestration, (a thing disputed), had been previously assigned to Messrs Glynn and Halifax of London, in security of a *Company* debt, amounting to above £24,000, which was more than double its then value; and Samuel Garbett's stock was also mortgaged in security of some of his debts. The diligence of arrestment might, he stated, have been defeated by a new sequestration of all the parties concerned, within thirty days of its date.

In this situation of matters, and in the year 1774, an arrangement was gone into by the trustees of Francis Garbett and Co., whereby the trustee (Mr Grant) for the creditors of Messrs Fairholme, was to receive an assignment of £6000 of Mr Gascoigne's Carron stock, and £2000 in money, and the interest of his debt paid regularly; he, on his part, loosing the arrestments used by him. This agreement was gone into with the sanction of the trustees for the creditors of Francis Garbett and Co., and by Mr Gascoigne, on the one part, and it was accepted of by Mr Grant, and a committee of Messrs Fairholme's creditors. The assignment of stock was made, of £6000 value, and implement made otherwise under this arrangement.

The creditors, however, of Messrs Garbett and Co., became dissatisfied with Mr Gascoigne's management as factor under the trustees, and it was subsequently found that the trustees were not legally appointed or vested with the office, and their whole management was therefore set aside, but Mr Home's appointment as interim factor was held still to subsist. He, however, having applied to be relieved from that duty, and exonerated, Mr Wm. Anderson, W.S., was appointed in his stead.

It thus became necessary to traverse the same ground gone

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over; to review the transactions formerly gone into with Mr Grant, the trustee for Messrs Fairholme's creditors, and to lay that agreement, as the basis of a new agreement, before the creditors. This was done in 1777, and after having several meetings with the creditors, who, upon the question, whether the former agreement of 1774 should be confirmed, agreed to confirm, and confirmed it accordingly.

Thereafter the Carron Company brought three several processes of multiplepoinding, for ascertaining the various rights and the validity of the claims made by different parties to the Carron stock. In so far as regarded the stock standing in the name of Francis Garbett, there was no room for question. The assignation of it in security held by Messrs Glynn and Hallifax had been granted long before the bankruptcy. These gentlemen were preferred to it.

The respondent, Mr Selkrig, succeeded, on Mr Grant's death, as trustee for the creditors of Messrs Fairholme.

The appellant, who succeeded to Mr Anderson as trustee, stated, that a series of transactions then occurred, which proceeded on the footing that he, Mr Selkrig, was to be paid proportionally with the other creditors, and that he had received dividends on the individual estate of Mr Gascoigne, on this principle.

He then thought proper to prove of new, under the commission on Samuel Garbett's bankrupt estate, omitting all notice of the agreement.

Having also, sometime afterwards, discovered, in consequence of the Carron stock having greatly risen in value, in an interval of twenty years, that there would be a reversion after paying Glynn and Hallifax's preferable claim, he attached the stock belonging to Francis Garbett, by confirming as executor-creditor to Francis Garbett, then deceased. The appellant here interposed, considering himself entitled to demand from the preferable creditors an assignation to the reversion of that stock. This forms the subject of the next appeal.

Mr Selkrig then brought an action for payment of £30,885, 9s. 3d., as a balance of debt still due the Fairholmes, after giving deduction of the sums paid under the original agreement, and founding on that agreement as the basis of the action.

Reductions were brought by the appellant, as trustee on the estate of Francis Garbett and Co., and one in the character of trustee on the estate of Mr Gascoigne, concluding that

the agreement or contract entered into by Mr Grant and Mr Anderson, and the decree of preference obtained by the former to the twenty-seven shares of the Carron stock, should be reduced and set aside, and the appellant and his constituents restored against the same *in integrum*, on the following grounds, 1st, That it was highly unequal, and unjust, and attended with enormous lesion to the general body of creditors. 2d, That the agreement was illegal, as beyond the powers, not only of those who made it, but of Mr Anderson and his committee, who afterwards confirmed it. 3d, That, supposing the trustee to have possessed power of entering into the agreement, it was not exercised in the form required by the meeting of creditors. 4th, That supposing the contract obligatory, it did not entitle him to immediate payment of both his bygone interest and principal debt.

The Court pronounced this interlocutor, "The Lords "conjoin the actions of reduction with each other, and with "this process; in the actions of reduction sustain the de- "fences, repel the reasons of reduction, assoilzie the defender, "and decern, but find no expenses due; and in this process, "adhere to the interlocutor reclaimed against, and refuse the "desire of the petition, but reserve to the petitioner to be "heard on any errors which he may allege to exist in the "statement of the debt, as made up by the respondent, and "particularly as to the effect of the abatement of £181, 6s. 9d. "sterling, and interest admitted by him, and remit to the Lord "Ordinary to hear parties accordingly, and do as he shall "see cause." Feb. 21-23, 1815.

Against this interlocutor an appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The agreement or contract on which the respondent's claim is founded, was highly unequal and unjust, being attended with the most enormous lesion to the general body of the creditors, both of Francis Garbett and Co., and of Charles Gascoigne. This appears clearly from a comparison of the stipulations on each side. The trustee for Messrs Fairholme's creditors, was creditor of Charles Gascoigne, having Samuel and Francis Garbett bound to him as cautioners. He had also an heritable security over certain lands. In regard to the rest of Mr Gascoigne's funds, he was entitled only to rank proportionally with the other creditors, and he had no right whatever to any part of the estate of Francis Garbett and Co. By the terms of the agreement, while his heritable security was to be

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made more effectual by various new provisions, he was to receive, in the first place, twenty-seven shares of Mr Gascoigne's Carron Stock, then valued at upwards of £6000, and which by the dividends drawn on them, and the price for which they were ultimately sold, have yielded him nearly double that sum. He was, in the *second* place, to receive in part of his principal sum, £2000, and was, besides, to draw dividends in proportion with other creditors, not only from the separate funds of Mr Gascoigne, but from the Company estate, on which he had actually no claim. He was, *lastly*, to have his interest regularly paid each year, till his debt should be wholly discharged, an obligation which he contends, and which the Court of Session, by the interlocutors appealed from, have found to import that he was to have his debt, principal and interest, fully paid, though no other creditor should receive one farthing.

The only equivalent given in return for these advantages was a consent to withdraw (or as it was ultimately arranged), to make over to the appellant's predecessors, the arrestments of Charles Gascoigne's, Francis Garbett's, and Samuel Garbett's, Carron stock.

But Mr Gascoigne's Carron stock was covered by the previous sequestration, and the arrestments, in so far as regarded it, were null and void.

The stock belonging to Francis Garbett was effectually impledged for a debt more than double its supposed worth. It was more than twenty years after this transaction, before there appeared the least probability of a reversion, and it then arose only from the preferable creditors having chosen to refrain from selling the stock, and from his drawing dividends on his full debt from the sequestrated estates. The private creditors of Mr Gascoigne had, besides, no interest in this stock, which could have made it an object with them to liberate it from arrestment.

It was the liberation of Mr Samuel Garbett's stock, however, or the acquiring right to the arrestment of it, which, from the history which has been given of the transaction, was the main inducement, which led to the agreement and its subsequent confirmation.

Several of the creditors of Francis Garbett and Company, had Samuel Garbett bound in farther security, but three times as many of them, (and who were creditors for debts to a very large amount), had no concern with him or his Carron stock, and could derive no benefit from having the arrest-

ments withdrawn, yet their interest was materially sacrificed by admitting Messrs Fairholme's debt, not only to rank on the Company's estate, but to be fully paid in preference to every Company creditor. In the same manner, one-half of Charles Gascoigne's proper creditors, and whose debts amounted to greatly more than one-half of his whole proper debts, exclusive of that due to Fairholme's trustee, had no interest in liberating Samuel Garbett's Carron stock from the arrestments, and even those creditors of the Company, and of Mr Gascoigne as an individual, to whom Samuel Garbett was bound, would have made a very bad and absurd bargain, if they had agreed to pay out of the sequestrated funds, the whole debt due to Fairholme's trustee, for the chance of drawing a part of it back from Samuel Garbett's funds, in virtue of the arrestments which had been used by Fairholme's trustee; and besides, whatever might be so drawn, would, in fact, be in so far drawn out of their own pockets, as it would diminish the dividends they would be entitled to, in their own right, as creditors of Samuel Garbett.

The creditors on either estate have not drawn one farthing in virtue of the arrestments which Mr Grant made over to them. The prospect of a reversion from the stock either of Francis or Samuel Garbett, appeared at the time the actions of multiplepoinding were brought, to be so hopeless, from the amount of the preferable claims, that it was thought useless to attempt obtaining a decree of preference *secundo loco;* and as no change to the better took place for much more than five years afterwards, the arrestments and the actions founded on them were cut off by the quinquennial prescription established by the Statutes, 1669, c. 9, and 1685, c. 14.

Neither is there the least ground to doubt that the arrestments, had they remained with Mr Grant, would have been just as useless and unproductive, as they were to Mr Anderson. The original trustees appear, from their letter to Mr Gascoigne, of 30th December 1773, to have been perfectly aware of their power to defeat the arrestments by a sequestration, and to have been determined to do so, if the arrestments were persisted in.

2d, The agreement in question was in itself illegal, as beyond the powers, not only of those who originally made it, but of Mr Anderson and his committee, who afterwards confirmed it.

The original agreement, 1774, it is not disputed, was altogether null, being formed by a set of trustees who were found by

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the Court of Session, to have had no right to act. The question turns entirely on the confirmation 1777, which, in the circumstances, had the same effect, and must be regulated by the same principles, as if the agreement had been then, for the first time, concluded.

An objection to the validity of Mr Anderson's appointment arises from the form of his election. There were two distinct estates under sequestration, belonging to different classes of creditors, and each class was alone entitled to direct the management and distribution of its respective estate. When the creditors present, therefore, proceeded to determine that the sequestrated estates should be managed by a trustee, and to appoint Mr Anderson to that office, without distinguishing whether they were acting as creditors of Francis Garbett and Company or of Charles Gascoigne, but in a sort of mixed capacity of creditors on both, they acted irregularly and incompetently, and nothing they did could be legally effectual, as under the Act of Parliament in virtue of which they were met.

The appointment of themselves as a committee to be a check on the trustee, lest he should improperly confirm the transaction of the former trustees, was also objectionable, as three of the five gentlemen who thus elected themselves, represented constituents who had an interest in these very transactions. And although no one could vote where his constituent had a direct interest, yet, as all the transactions were liable to the same objection, each had the strongest inducement to confirm those of others, however improper. But supposing the trustee to be effectually vested with the office, both as to the estate of Francis Garbett and Co. and Charles Gascoigne, he could have had no power to make an agreement of the present nature, by which one particular creditor of Mr Gascoigne was to receive full payment of his whole debt from both estates, though he had no claim on that of the Company in preference to every creditor, and though not one of them should draw a farthing.

3d, Supposing the trustee to have possessed a power of entering into the agreement, it was not exercised in the form required by the meeting of creditors by which he was appointed.

The first meeting called for considering the transactions of the former trustees, was held on the 21st October 1776, but the minutes do not state that it was called on ten days previous notice, though this was an indispensable condition. No

resolution was then come to, but the particular transaction with Fairholme's trustee was afterwards approved of by four of the committee, at an ordinary monthly meeting on 2d December. It was impossible to hold that this meeting was one in terms of the tenth condition imposed by the general meeting of creditors.

4th, The contract was, except in so far as regarded the twenty-seven shares of Carron stock assigned to Mr Grant, abandoned and given up, the parties having, for a period of above thirty years, regulated their conduct on principles which were quite incompatible with its remaining in force.

5th, Though the contract should be held to be still obligatory in all its parts, it does not entitle the respondent to the immediate payment of both his bygone interest and principal debt. He was to get preferable payment of the interest on the debt regularly every year; and in so far there may be a claim which is preferable to that of the other creditors. But there is no preference as to the principal sum, which is to be paid by dividends, made proportionally to the whole. Nor does the obligation to pay his interest regularly till his debt be discharged, imply a *preference* as to the *principal sum*, for that would be, in fact, giving him an undue preference over all other creditors as to his whole debt.

Pleaded for the Respondent.—1st, The contract, of which implement is demanded by the respondent, and of which the appellant has brought a reduction, was solemnly concluded by a regular deed, duly executed by the parties having interest on the one side and the other. It was ratified by a solemn judgment of the Court of Session. It was carried into effect by full implement on the part of Mr Grant, and by partial implement on the part of the appellant's predecessor, and it has subsisted unchallenged for thirty-seven years. The obligations of it are not prescribed and not discharged. Therefore, it is not competent to the appellant either to reduce the contract or to refuse implement of the obligations thereby undertaken by the trustee for the creditors of Francis Garbett and Co., and Charles Gascoigne, on any ground whatever.

2d, The allegation of the appellant, "that the agreement "1774, and the subsequent contract 1777, were unequal "and unjust, being attended with the most enormous lesion "to the general body of the creditors both of Francis Garbett "and Company, and of Charles Gascoigne," is both irrelevant in law and unfounded in fact. It is irrelevant at a distance

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of forty years, to allege as a reason for not fulfilling the stipulations of it, that it was unequal or unjust, which is only saying that it has not turned out so advantageous as was expected, and, besides, the fact is unfounded, it was manifest to all that it was the only way advantageously to dispose of the estates.

3d, Mr Anderson, as trustee for the creditors of Francis Garbett and Co., and Charles Gascoigne, with the consent of the committee appointed for the purpose, had full power to conclude the contract; these powers were lawfully and effectually exercised; and the contract so concluded, though effectual without any judicial confirmation, was, in fact, sanctioned by an express judgment of the Court.

After hearing counsel,

It was ordered and adjudged that so much of the interlocutor of 23d February 1815, as sustains the defences in the actions of reduction, repels the reasons of reduction, assoilzies the defender, and decerns be, and the same are hereby affirmed; and with respect to all other matters in the several interlocutors complained of in the said appeal, it is ordered that the cause be remitted back to the Court of Session to review the said interlocutors, with relation to such other matters, and, particularly, for the purpose of considering the true intent and meaning of the contract and agreement of the 28th April 1777, referring to, ratifying and confirming the contract of January 1774; and more especially with regard to the question as to interest beyond the 1st January 1776, and after such review and consideration, to do therein as shall be just.

For the Appellant, *Sir Saml. Romilly, Mat. Ross.*

For the Respondent, *John Leach, John Clerk, Jas. Moncreiff, Francis Horner.*

NOTE.—Unreported in the Court of Session.

WM. HENDERSON, Trustee on the Sequestrated Estates of Francis Garbett and Co., late Merchants at Carron Wharf, and of Charles Gascoigne, one of the Partners of that Company, as an individual, } *Appellant;*

RICHARD CARR GLYNN, THOMAS and SAVILLE HALLIFAX, Bankers, Representatives of the late Messrs Glynn and Hallifax, Bankers in London, and CHARLES SELKRIG, Trustee for the Creditors of Messrs Adam and Thomas Fairholme, } *Respondents.*

House of Lord, 27th June 1816.

RELIEF—ASSIGNATION—BANKRUPTCY OF COMPANY.—(1) Held, that a co-obligant, insisting on an assignation from the creditors, holding a separate security over his co-obligant's separate estate, in order to operate relief against that estate, for sums drawn out of his estate, more than out of it, was not entitled to demand an assignation in the circumstances of this case. (2) It having been disputed whether the individual estate of a partner in a bankrupt company, had been included in the sequestration of the company, held that after a silence of thirty years, it was impossible to hold that the sequestration extended to his individual estate.

By the preceding appeal it has been seen that Messrs Glynn and Hallifax were large creditors of Francis Garbett and Co., as well as of Charles Gascoigne, as an individual to the extent of £24,000, as at 1st January 1774; and that they were preferably secured as creditors on the Carron stock held by Francis Garbett, as an individual, which was assigned to them in security. The debts due by the Company amounted to £86,163, 3s. 4d., by Charles Gascoigne, as an individual, including Fairholme's trustees, £43,284, 6s. 2d.

The whole creditors ranked on Charles Gascoigne's individual estate, and drew dividends from it; and the appellant insisted that he was entitled to relief against Francis Garbett's individual estate, in other words, relief from the Carron stock in question, to the extent of what he alleged was paid more than his proportional share in the joint obligation. In the multiplepoinding raised by the Carron Company, Messrs Glynn and Hallifax were preferred, and decree of preference obtained. Although they had received a power to sell the

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stock, yet for almost twenty years they delayed to do so. In the interval, the value of the stock had risen immensely, so as, after paying their debt, to leave a reversion over.

A question had been made, but never determined, whether Francis Garbett's *individual* estate had been included under the sequestration, a question which came to be of importance now that there was a prospect of a reversion, arising from the value of his individual stock. In these circumstances the appellant presented a petition to the Court, praying that they would resume consideration of this question, and to find that the sequestration did include Francis Garbett's separate estate. The respondent, Mr Selkrig, the trustee for the creditors of Messrs Fairholme, who had taken out a confirmation *qua* creditor of the deceased Francis Garbett, so as to affect this stock in payment of his constituents' debt, appeared and opposed this application, having it in view to rank and claim whatever reversion there might be, for his constituents' debt. The Second Division of the Court held that after so long a silence on the part of the creditors, it was impossible to hold, that the sequestration could extend to Francis Garbett's estate.

It appeared that, all this time, Messrs Glynn and Hallifax had continued to draw the dividends arising on this Carron stock. They had also drawn dividends from the estate of Charles Gascoigne, and even for debts properly due out of the estate of Francis Garbett; and, failing in the above application, the appellant then proposed to the representatives of Messrs Glynn and Hallifax, that since they had failed to make use of their separate security, to the extent they ought to have done, and had ranked for their full debt on Mr Gascoigne's estate, and had drawn dividends from both his and the Company estate, they should grant to the appellant an assignation (assignment) to their security, to enable him to make effectual the relief to the extent of one-half the dividends drawn by them, which, in the circumstances of the case, he was entitled to claim from the estate of Francis Garbett. And he stated, that it was not necessary to show that Charles Gascoigne had paid more than the half of the joint debts, it was enough, if it appeared, that what had been paid from his estate, on the ground of his being cautioner for Francis Garbett, exceeded what had been paid from Francis Garbett's estate, each being liable *in solidum*, each was to be considered as principal debtor as to his own half, and *cautioner* for his co-obligant in the other half. And, therefore, even supposing the in-

dividual estate of that gentleman did not fall under the sequestration, yet he was entitled to demand an assignation from the representatives of Messrs Glynn and Hallifax, for whose debt, as due by Francis Garbett and Co., Francis Garbett's estate was as directly bound, as that of Charles Gascoigne, each being principal debtor for one-half of that debt, and cautioner for the other, in the other half; and the appellant, in his argument, founded very much on the case of Sir Robert Maxwell *v* Heron, as applicable to the present. *Vide ante*, vol. iii., p. 350.

The Court, after several interlocutors, pronounced this interlocutor:—"Upon the first prayer of the petition respecting the amount of the balance of debts remaining due to the representatives of Messrs Glynn and Hallifax, they remit to the Lord Ordinary to do as he shall see cause; and, *quoad ultra*, in respect it was long ago decided that in the bond granted to the trustee for the Messrs Fairholme, Charles Gascoigne was the principal debtor, and Francis Garbett, in effect a cautioner only, Find that the petitioner, Mr Henderson, as standing in the right of Charles Gascoigne, the principal debtor, is not entitled to require an assignation from the representatives of Glynn and Hallifax of the Carron Company stock belonging to Francis Garbett, the cautioner, to the prejudice of Mr Selkrig, trustee for the creditors of Messrs Fairholme, to whom both the principal debtor and cautioner stand jointly and severally bound as full debtors. Therefore, refuse the second prayer of this petition; and in so far adhere to the interlocutor of the Lord Ordinary reclaimed against."* Dec. 10, 1811.

On reclaiming petition the Court adhered. Jan. 21, 1812.

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* Opinion of the judges:—

Mr Selkrig's Right to oppose.

Lord Succoth.—"I do not at present understand whether it is necessary here to decide the question, with regard to the validity of Mr Selkrig's confirmation as executor-creditor, and the arrestments used by him, of the Carron stock, or rather the renewing of the arrestments, which had been laid upon this stock by his predecessor in office, Mr Grant, in 1773.

"This is a question of some difficulty, which was formerly discussed at great length, and seems to have been before the Second Division of the Court; but it is said that the Court did not give their decision, as it was not necessary to decide it, the Court being clear that the creditors, after having for thirty years relinquished

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Against these interlocutors the present appeal was brought to the House of Lords.

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their claim for sequestrating the estate of Francis Garbett, as an individual, could not now revive it.

"It is said, that unless Mr Selkrig had a right to attach the stock by his arrestments, he has no interest to object to the assignment claimed by Mr Henderson. If so, and that question be open, I doubt if Mr Selkrig could attach this stock by arrestments after his predecessor had agreed, for a valuable consideration, to give up the arrestments in 1773. It is said he did not get the full consideration, as the interest stipulated was not regularly paid, but he got £2500 down. He got twenty-seven shares of Mr Gascoigne's Carron stock, which, but for the agreement, must have been shared with the other creditors; and he continued to act under the agreement, although the interest was not paid, and never objected to it on this head."

Question of Relief.

"The state of the fact is distinctly explained in the papers set forth, that whether we take the debt due to Glynn and Hallifax *alone*, or the whole joint debts on which Charles Gascoigne and Francis Garbett were co-obligants, into view, that in neither case has so much been paid out of the private estate of Charles Gascoigne, as has been paid out of the private estate of Francis Garbett, and what is more material, that *in none of the different views given by the accountant, has Charles Gascoigne's estate paid one-half of the joint debts* due by those two co-cautioners. Therefore, on the principles adopted in the case of Macdowal in 1798, the claim of relief set up by Mr Henderson, as trustee for Charles Gascoigne, is not well founded. Unless *one* of *two* co-cautioners has paid *more* than *half* of the debt for which they are both bound, upon what principle can he claim relief against the other co-cautioner? The original creditor may, no doubt, claim *in solidum* against both; and in this case he has done so; and if he had drawn more than the half from the *one*, he might be obliged to *assign* his debt to the *other*, that he might operate his relief.

Cranston v. M'Dowal, May 22, 1798, Fac. Coll. & Mor. p. 2552.

"The decision in the case of Macdowal was not inconsistent with that of the House of Lords in the case of Heron *v.* Maxwell, for the questions were substantially different.

Vide ante, vol. iii., p. 350.

"Mr Selkrig also founded a separate argument upon the alleged fact that Charles Gascoigne was the principal debtor, and Francis Garbett only cautioner in the debt, in which case, he maintains that, even although the estate of Charles Gascoigne had paid more than his *half* of the debts, still Mr Henderson could not be entitled to relief from the estate of Francis Garbett, until he *had relieved* Francis Garbett of his cautionary obligation to Fairholme's credi-

Pleaded for the Appellant.—The ratio assigned in the interlocutor of the Court of the 5th December 1811, for holding the appellant to be barred from demanding an assignment, cannot justly have any such effect. The appellant, as trustee on Mr Gascoigne's estate, is not limited to such pleas, as Mr Gascoigne might himself have maintained, had he been solvent. He is trustee for the whole of Mr Gascoigne's creditors, and as such, is entitled to make every claim for their behoof, which they might have done individually. But if the whole creditors have, in consequence of the mode in which the joint debts have ranked on Mr Gascoigne's estate, right of relief against that of Francis Garbett, and a title to make this effectual, to a certain extent, by obtaining an assignment to the preferable security on the Carron stock, they cannot be prevented from doing so, because a single creditor has attempted to carry off the reversion of this fund, by a diligence to which the assignment must naturally be preferable. This single creditor cannot, from the mere circumstance of his being so, or having Francis Garbett bound as cautioner, have any right of preference over the Company creditors, as those to whom Charles Gascoigne and Francis Garbett were bound as co-principals. Neither can he have any preference even to the individual creditors of Mr Gascoigne, for the claim of relief at their instance, is founded on the payments made from Mr Gascoigne's estate, towards debts which belong primarily to Francis Garbett. They have a right, therefore, to come upon the estate of the latter, although he might not have been originally bound to them, no less than his proper creditors, and if the assignment is such, as from its nature, must give them a right to the reversion of the Carron stock, which is preferable to that arising from Mr Selkrig's confirmation, they are entitled to the benefit of it. There can be no doubt, however, that the assignment must give a preference to the confirmation. It proceeds on the footing, that Messrs Glynn and Hallifax ought in justice to have taken a larger proportion of their debt from the Carron stock, and it produces the same effect as if they had done so, by substituting Mr Gas-

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tors. But there is no sufficient evidence of the fact on which this plea is founded.

"In the original bond granted to Fairholme's trustee, Francis Garbett was no less *principal debtor* than Charles Gascoigne."—*Vide Campbell's Collection of Session Papers, vol.* 145.

The other judges went on the grounds stated in the interlocutor.

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coigne's creditors, or the appellant, as their trustee, in place of Messrs Glynn and Hallifax, and by giving him the benefit of their right of pledge, which is indisputably preferable to every other claim upon Francis Garbett's Carron stock, and in particular to the confirmation of Mr Selkrig, which, by its nature could only affect the balance, if there were any remaining, after satisfying the claim of Glynn and Hallifax, or the appellant as their assignee, upon the preferable security held by them over that stock.

2d, The appellant is not barred from demanding the assignment by the contract betwixt Mr Grant and Mr Gascoigne, which was subsequently confirmed by the appellant's predecessor, Mr Anderson. For the stipulation as to the regular payment was originally null, and was also passed from and given up, and a mode of distribution of the sequestrated estates adopted, and sanctioned by Mr Selkirg himself, which was quite inconsistent with it. At any rate, Mr Selkrig has no interest to oppose the assignment on this ground; for, if successful in his action on the contract, he will recover his full payment from the appellant, in so far as the funds in his hands, including the reversion of the Carron stock, may be sufficient for this purpose.

3d, The estate of Charles Gascoigne, having been ranked upon, for the whole debts for which he and Francis Garbett were jointly bound, while the estate of the latter has not been brought under distribution, nor ranked upon by any of the creditors, there arises to the former, a right of relief against the latter, to the extent of one-half of the dividends paid on the joint debts. And in these circumstances, the appellant is entitled to insist that the respondents, the representatives of Messrs Glynn and Hallifax, shall either draw their payment, as far as possible from Francis Garbett's estate, by exhausting their separate security, or grant him an assignment to it, to the extent of the dividends they have drawn from Mr Gascoigne's estate, that he may operate his relief from the reversion. There is no room for a counter-claim of relief in consequence of the sum drawn by Messrs Glynn and Hallifax, from Francis Garbett's Carron stock, seeing that they have ranked on Mr Gascoigne's estate for their full debt; and were such a counter-claim even to be admitted, there will still be a large balance of surplus payments from Mr Gascoigne's funds, and the appellant will, at least, be entitled to an assignment to the effect of recovering from the Carron stock, the one-half of this excess. The connection between Francis

Garbett and Charles Gascoigne as partners, and between the debts, as company debts, it is submitted, fortifies this plea. For one out of perhaps fifty company debts, Francis Garbett gives a security upon his Carron stock. The remaining forty-nine debts, to four or five times the amount, in each of which Francis Garbett is the proper and principal debtor for one-half, are suffered to come upon Charles Gascoigne and his individual estate alone, Francis Garbett's individual estate paying no part. In such a case, surely, it is just and equitable, that the creditor, holding the security upon Francis Garbett's stock for the single debt, should draw his whole payment from the fund over which his security extends, when so many other Company debts come upon Charles Gascoigne's individual estate.

Pleaded for the Respondents Sir Richard Carr Glynn, and Thomas and Saville Hallifax.—The respondents have neither interest nor inclination to interfere in the question of reciprocal relief between the appellant on the one hand, and the respondent, Charles Selkrig, on the other; but they have an interest to insist that they shall not be decerned to assign in favour of either of these two parties, or restrained in ranking and drawing dividends on their respective estates, until the debt due to them shall be paid. The respondents hold three securities for their debt; 1st, Their personal claim against the estate of Francis Garbett and Co. 2dly, A similar claim against the estate of Charles Gascoigne; and lastly, The real security of the Carron stock of Francis Garbett. And they humbly conceive that they are not bound to transfer any one of these securities to any party, or to suffer their interest in any one of them to be diminished, or in any-way weakened or embarrassed, until their debt shall be paid.

The appellant is pleased to say, that if the respondents will assign their Carron stock to him, he will sell it, and pay their debt with the first of the price which he receives; in other words, he undertakes to hold the stock as trustee for their behoof, in the first place. He cannot claim the property as long as any part of the debt due to the respondents remains unpaid; but he insists that he shall have the administration of it. Now, the respondents humbly conceive, that they have just as good a right to the administration as to the property itself. No party asserts, or can pretend to have any interest in this Carron stock, until the debt due to the respondents shall be paid. The right of property, redeemable no doubt, is vested in them. It did not belong to any

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of the estates over which the respondent is trustee, while the owners were solvent, and it does not belong to the appellant now. In the same manner the right of administration did not belong to any of his authors, and it does not belong to him now. The respondents have no desire to retain this property for an instant after their debt shall be paid, nor have they any inclination to act capriciously between the appellant and the other respondent, Mr Selkrig. On the contrary, they have waited now more than forty years for the payment of this money; they will be most happy to receive it, and to execute an assignation in favour of either party whom the law shall prefer; but until the money shall be paid, they do not hold themselves bound to assign in favour of either the one or the other.

Pleaded for the Respondent, Mr Selkrig.—The dividends corresponding to the debt due to Glynn and Hallifax, made from Charles Gascoigne's estate, at and prior to 10th January 1803, added to what Glynn and Hallifax have already received, and will still receive from the proceeds of Francis Garbett's Carron stock, do fully pay, and of course extinguish, the debt due to Glynn and Hallifax; and after that debt is so paid and extinguished, there remains a surplus of proceeds of the said Carron stock. But the debt to Glynn and Hallifax being thus extinguished, they can have no right or interest in, or power or control over the surplus of Francis Garbett's stock; and it is therefore altogether incompetent for them to assign any right over such surplus to any other party, so as to affect the respondent's preference lawfully acquired. The balance of debt due to Glynn and Hallifax at Lammas 1810, was £10,694, 13s. 9$\frac{1}{12}$d. The value of the Carron stock as now estimated, is £19,800, so that there is a surplus of £9694, 13s. 9d. over. It seems to be self evident that Glynn and Hallifax, after the balance of their debt is thus provided for, and of course the whole debt due to them fully paid up and extinguished, have nothing at all to do with this surplus, and that any attempt by them to assign it would be to assign what does not and cannot possibly belong to them. The respondent, by his confirmation, is preferable over this stock to every other creditor, excepting Glynn and Hallifax; and, consequently, the moment that their debt is extinguished by payment, the respondent's preference attaches and secures the whole surplus as his property, to the effect of being applied for payment of his debt. If the appellant can make any good demand upon the respondent, as in the legal possession of that surplus stock, it may be competent to him to

insist in such a demand, the merits of which will remain to be considered. But, in the meantime, Glynn and Hallifax have no power to grant any assignment of a subject which does not belong to them; but by the extinction of their debt, falls under the legal dominion and control of the respondent.

2d, Neither the appellant, as the trustee of Charles Gascoigne, nor the creditors of Charles Gascoigne, have given any consideration to Glynn and Hallifax for the assignment which the appellant requires them to grant. Indeed, so far from having given any consideration, the appellant and his constituents have not paid nearly the share of the debt due to Glynn and Hallifax, which properly falls upon the estate of Charles Gascoigne. Charles Gascoigne and Francis Garbett are joint and several obligants in the debt to Glynn and Hallifax; they are bound *singuli in solidum* to the creditors; but, in the accounting between themselves, they are precisely on an equal footing, each being liable for one-half of the debt. Charles Gascoigne is no more cautioner for Francis Garbett, than Francis Garbett is cautioner for Charles Gascoigne. Each is principal debtor for one-half; and when either obligant *has paid his own half*, he is creditor in relief for whatever sums he may be obliged to pay on account of the other half of the debt, in which he is cautioner, and the other obligant principal debtor. But while his own half of the debt is unpaid, all his payments only go to extinguish his own debt, and he can be held to have paid nothing as cautioner for the other.

Now, the fact is ascertained, that the estate of Charles Gascoigne has paid, on account of the debt of Glynn and Hallifax no more than £13,832, 15s. 2d., while the estate of Francis Garbett has paid, and will pay on account of the same debt, £59,067, 10s. 4d., being more than four times as much as the estate of Charles Gascoigne has paid. From this it is evident, that the estate of Charles Gascoigne, instead of having paid that half of the debt in which he is principal debtor, has not paid much above *one-third* of such half. It consequently appears to be quite impossible to maintain, that the appellant or his constituents, have given any consideration whatever to Glynn and Hallifax for the assignment which they now demand; on the contrary, they have not paid to Glynn and Hallifax nearly that part of the debt for which they were themselves liable as principal debtors, and they have obliged Glynn and Hallifax to take payment of the greater part of that proportion from the estate of Francis Garbett, which, in regard to the appellant, was only liable for it as a cautioner.

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In these circumstances, the appellant professes to maintain, that the estate of Charles Gascoigne has given a sufficient consideration for the assignment. *In the first place*, he states, that, in point of fact, Glynn and Hallifax have been ranked for the full amount of their debt on the estate of Charles Gascoigne, and have hitherto drawn dividends corresponding to the full debt. The half of such dividends he is pleased to consider as paid on Charles Gascoigne's half of the debt, and the other half of them he considers as paid on Francis Garbett's half of it. To the extent of one half of the dividends, therefore, paid from Charles Gascoigne's estate, the appellant contends that he is entitled to be relieved out of the estate of Francis Garbett; and, therefore, that to this extent he has given a sufficient consideration for the assignment required by him. In this part of the case, the appellant relied principally on the supposed application of the case of the creditors of Maxwell *v.* Heron, 8th February 1792, decided in the House of Lords 11th June 1794. It is believed that a little consideration will show, that that case is very far indeed from giving any aid to the plea of the appellant, because the case is essentially different.

After hearing counsel,

It was ordered, that the interlocutors of the 15th November 1808, and 7th February and 11th March 1809, complained of in the said appeal be, and the same are hereby affirmed.* And it is further ordered and adjudged that the interlocutor of 5th December 1811 be varied, by leaving out the words, "in respect it was long ago decided, that in the bond granted to the trustees for the Messrs Fairholme, Charles Gascoigne was the principal debtor, and Francis Garbett, in effect, a cautioner only;" and by inserting instead thereof, the words "under the circumstances of this case;" and that the said interlocutor be further varied by leaving out the words, "the cautioner, to the prejudice of Mr Selkrig, the trustee for the creditors of Messrs Fairholme, to whom both the

* These interlocutors of the Lord Ordinary had repelled "the demand of the trustee to obtain an assignation to Francis Garbett's share of the Carron stock held in security of their debts, in respect the debts in security of which they were so held were the proper debts of Francis Garbett and Co., and not of Francis Garbett personally."

principal debtor, and cautioner stand jointly and severally bound as full debtors therefor." And with these variations, it is ordered and adjudged, that the said interlocutors of 5th December 1811, and 21st January 1812, be, and the same are, hereby affirmed, with £147 costs, to be paid to the respondents, Messrs Glynn and Hallifax.

For the Appellant, *Sir Saml. Romilly, Mat. Ross, Alex. Irving.*

For the Respondents, *Messrs Glynn and Hallifax, John M'Farlane, W. G. Adam.*

For the Respondent, *Mr Selkrig, Wm. Adam, John Leach, John Clerk, Jas. Moncreiff.*

NOTE.—Unreported in the Court of Session.

[Dow., vol iii., p. 233.]

WM. BAYNE, Esq. of Newmill, . . . *Appellant;*
JOHN WALKER, Tenant in Newmill, . . *Respondent.*

House of Lords, 3d July 1815.*

LANDLORD AND TENANT—DESTRUCTION OF SUBJECT LET, BY FIRE—CULPA.—In the Court of Session it was held where the farm-house of the tenant was burned down by accidental fire, that the landlord was liable to rebuild the house. Reversed in the House of Lords.

The appellant is proprietor or landlord, and the respondent tenant, of the farm of Newmill, in the county of Fife.

At a time when the respondent's wife was confined to bed of severe indisposition, the farm-house was, unfortunately, burned to the ground, without any blame attachable to the respondent; and the present action was raised by him, first, before the sheriff, and afterwards insisted on before the Court of Session, insisting that the farm-house should be re-built by the appellant, or that the respondent should be empowered to re-build it himself, and to retain the rents until the expense should be paid.

In defence, the appellant stated that a landlord was not

* Omitted at its proper date.

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bound, in any case, to re-build a farm-house destroyed by accidental fire.

On proof, it appeared that there was a wooden bed situated about forty inches from the fire-place, containing straw in the bottom of it, with part of the straw sticking out through the bottom, in the spaces between the deals, and it was in this bed that the fire originated.

Both the judgment of the sheriff, and (when taken to the Court of Session), the Court, held the landlord, appellant, liable to re-build the farm-house, it appearing that there was "no evidence of culpable negligence on the part of the "tenant, sufficient to subject him in the expense of re-build-"ing the house in question."

The appellant brought the present appeal to the House of Lords, pleading, 1st, That the fire was occasioned without any fault on the part of the landlord, or for which he could be answerable by law. 2d, That where he has been guilty of no fault, the landlord is not bound to undergo the loss arising from damage done by fire. 3d, That the landlord is not liable *ex lege* to maintain his tenant in possession of the subject let, and to repair or replace the same when any part of it is destroyed by any fault or accident not imputable to the tenant. 4th, That there was no obligation in the lease to subject him in such liability.

After hearing counsel,

The Lord Chancellor addressed the House (*vide* speech in Dow's Report), and proposed the following judgment, which was carried accordingly.

It is ordered and adjudged, and the Lords find that the respondent, by his petition to the sheriff-depute of Fife-shire, required that it might be found that the appellant was liable to re-build the dwelling-house on the farm of Newmill, and to put it in the situation in which it was before the fire in the proceedings mentioned; and that the appellant might be decerned immediately to do so, and failing of his doing so, to grant warrant to the respondent to re-build and repair the said house, and to find the appellant liable in the expense thereof, and to allow the respondent to retain his rent until the said expense should be paid; and the Lords are of opinion, and find, that the appellant is not liable to re-build the said dwelling-house, as prayed by the said petition, sup-

posing there was no culpable negligence on the part of the respondent; and, therefore, and inasmuch as no other relief is sought by the said petition, the Lords find that it is not necessary for them to consider whether there was or was not evidence of culpable negligence on the part of the respondent, sufficient to subject him in the expense of re-building the said house; and it is therefore ordered and adjudged that the several interlocutors of the sheriff-depute of Fife, and the several other interlocutors complained of in the said appeal be, and the same are hereby reversed; and that the defender be assoilzied in the process before the sheriff, without prejudice to the question, whether there was culpable negligence in the respondent; and without prejudice to any question whether the respondent is entitled to any other relief than the relief prayed in his said petition to the sheriff-depute of Fifeshire.

For the Appellant, *William Adam, John Macfarlane.*

For the Respondent, *David Cathcart, Robt. Bell.*

NOTE.—The case, as thus disposed of, was expressly meant to decide the general question of law as to the landlord's non-liability to rebuild the house for his tenant, when burned down by accidental fire.

ALEXANDER CAMPBELL, JAMES CAMPBELL, JOHN MACMURRICK, WILLIAM ALSTON, and DAVID M'CULLOCK, all Merchants and Underwriters in Glasgow, } *Appellants;*

JAMES HAMILTON, Senior, and COMPANY, Merchants in Glasgow, . . . *Respondents.*

House of Lords 29th June 1816.

INSURANCE—UNSEAWORTHYNESS—An insurance on the cargo of a vessel from Greenock to New York was held to be good—the objection, that the vessel was lost, owing to her unseaworthyness prior to her commencing the voyage insured, not having been proved in evidence.

An insurance was effected on a cargo of goods shipped at

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Greenock on board the "Sarah" of New York bound on her return voyage from Greenock to New York. There was a total loss of the vessel and cargo; and the question came to be, in an action raised by the respondents against the appellants, for the sum insured (£1000), Whether the vessel was seaworthy, when she proceeded on her voyage?

It was alleged by the appellants, that when she arrived at Greenock from Alexandria, in America, with a cargo, her cargo was damaged by water, and so sensible was the master of the insufficiency of his vessel to carry out a cargo without a thorough repair, that he repeatedly expressed his resolution to have her docked in Greenock for that purpose; but which was never done, owing, it was alleged, to the want of funds,

May 9, 1809. and the vessel being arrested in the meantime.

It was also stated, that when she sailed on the voyage insured, which was on the 9th May 1809, she was exceedingly leaky, so much so, that in ordinary weather, it was necessary to pump once every hour, and when it came to blow the leak increased to such a degree, that she made ten or twelve inches of water in half an hour, and it afterwards appeared, that part of the sheathing had come off her bottom. The crew were at last obliged to abandon her, and betake themselves to the long boats, in order to escape to land.

The Admiralty Court before which the action was brought, allowed a proof; and upon consideration of it, the Judge Admiral was of opinion, that the vessel was not tight, staunch, and strong, or seaworthy.

In a reduction brought of this decree by the respondents, Lord Balgray, as Ordinary, pronounced this special interlocutor, to which reference is made for the facts of the case,

June 2, 1812. and the circumstances established in evidence:—"The Lord "Ordinary having considered the memorial of James Hamil- "ton and Company, merchants in Glasgow, pursuers, and "the additional memorial for Alexander Campbell, James "Campbell, William Alston, and David M'Cullock, all mer- "chants or underwriters in Glasgow, defenders, proof ad- "duced and whole process: Finds it instructed by the deposi- "tion of James Hague, formerly two-thirds owner and master "of the 'Sarah,' and to whose evidence there can be no ob- "jection from interest or otherwise, That in Spring 1807, "previous to the 'Sarah' making her voyage from Alexandria, "in America, to Greenock, the said ship was in a complete "state to perform the voyage to Britain and back again: Finds, "that the facts and circumstances which are proved to have

" occurred during the said voyage, are not sufficient to infer that " the ship was not seaworthy: Finds, that after delivering the " cargo at Greenock, the ship was detained there for a period " of three months; and that, during the said time, the crew " consisted of seventeen men at least, and were kept con- " stantly employed in repairing the vessel; and that it is " proved, that the carpenter belonging to her, was an attentive " and very careful man: Finds, that in consequence of some " inaccuracy in the ship's papers, she was detained by order " from the commissioners of the customs, which led to an " examination and valuation of the said vessel, which was " accordingly done by Messrs Scott, Steel, and Ramsay of " Greenock, persons every way qualified to judge of her " sufficiency, who concur in the opinion, that there was no " appearance of the ship being strained in her former voyage, " and that they were satisfied of her being staunch: Finds, " that the said opinion is fully corroborated by the deposition " of Mr James Denniston, junior, of Greenock, the ship-agent, " and of James Anderson, the second mate: Finds it in- " structed that the Captain, Mathew Dunnet, with the whole " crew, except two, returned to America in the said vessel: " Finds it proved, and admitted on all hands, that the vessel " had a most tedious passage outwards; and in the words of " Adam Butler, a witness referred to by the defenders, as " deserving of credit, that the weather was very bad during " the greater part of the passage, in the course of which, " the vessel encountered many hard gales and heavy seas; " that the prevailing winds were from the westward, and the " passage, upon the whole, a very rough one, so rough, that, " in the deponent's opinion, he might go the same voyage " fifty times more without once meeting the same weather: " Finds, that after the crew deserted the ship, and arrived at " New York, a claim was made by the owners, upon the un- " derwriters, for the value of the said ship, which had been " insured by them for £2250, and that the same was paid " accordingly; and as the said underwriters had then on the " spot, every opportunity of investigating the whole facts, " it is to be presumed that they were satisfied with the justice " of the said demand: Finds, that the evidence of Nicholas " Netterville and Adam Butler, two of the common seamen, " is not sufficient to counter-balance the other evidence ad- " duced; and that the evidence of other respectable persons " referred to by the defenders, is either too vague or general, " or founded upon transient observations at the time: Finds,

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"that the defence of the ship 'Sarah' not being seaworthy "when she sailed from Greenock on her voyage to America, "in September 1807, is not established in a satisfactory manner; on the contrary, that the pursuers have shown, that "the ship was in a condition to encounter the ordinary perils "of the intended voyage, and that the loss of the said ship "is reasonably to be attributed to the extraordinary unforeseen "perils of the sea: Therefore, reduces the decree of the "Judge Admiral, and decerns, and declares accordingly: "And further, decerns against the defenders for payment of "the sums underwritten by them, severally and respectively "with interest, all in terms of the conclusions of the libel: "Finds expenses due, including those incurred in the High "Court of Admiralty; allows an account thereof to be given "in, and remits to the auditor to tax the same, and to report. "Lastly, in respect that the case is of considerable importance in itself, is attended with difficulty from the contrariety of evidence, from which diversity of opinion may "arise, and is fully discussed in the memorials for the parties, "recommends to them, if dissatisfied with the interlocutor to

June 24, 1812. "apply to the whole Court." On representation, his Lordship adhered.

Nov. 28, 1812. Feb. 17, 1813. May 18, 1813. June 29, 1813.

The Court, after four reclaiming petitions having been lodged against the above interlocutor in which the case of Watt *v.* Morris was relied on (*ante* vol. v., p. 697), adhered.

Against these interlocutors the appellants (defenders), brought the present appeal to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of, be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk, Wm. Buchanan.*

For the Respondents, *J. A. Park, Robt. Forsyth.*

NOTE.—Unreported in the Court of Session.

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WILSON v. LAIDLAW.

JOHN PETTIGREW WILSON, residing at Shettlestone, near Glasgow, . . *Appellant;*

WM. LAIDLAW, Writer in Dumfries, solvent partner of James Milligan and Company, formerly Merchants in Glasgow, . } *Respondent.*

House of Lords, 29th June 1816.

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MINOR—OBLIGATIONS WHEN IN TRADE—IN REM MINORIS VERSUM—CURATOR—SETTLED ACCOUNT.—A minor was engaged by his father in a copartnery trade, at fourteen, held (1) That the minor, on the failure of the concern, was liable in payment of the Company debts. A claim was made by one of the partners, for advances to the Company, held (2) That the minor was not liable to pay such debt, as in a question between partner and partner. But (3), as in a question with the *bona fide* creditors of the Company, held the debt of the respondent, Laidlaw, to be sufficiently established against the Company. Reversed in the House of Lords, and held that there was no sufficient evidence that the debt claimed by Laidlaw's firm was a real debt due to Milligan and Co., by the Green Coal Company, but one due to Milligan, as an individual, who was a partner of the Green Coal Company, and who, if his debt was good, could only demand payment after all the Company creditors were paid. (4) The minor's father had signed and adjusted accounts, wherein this claim was made to appear as a debt due to Milligan and Co. by the Green Coal Company. Held that this did not bind the minor.

The question here at issue arises out of the Green Colliery Company transactions as set forth in the case reported at p. 182, vol. v.

The Misses Pettigrew, the heirs portioners of the estate of Green, had granted to Walter Wilson, a Merchant in Glasgow, who was then married to their sister, Margaret Pettigrew, a lease of the valuable coal on the estate of Green. This lease bore expressly to be for the use and behoof of the appellant, Walter Wilson's son, and to Walter Wilson, merely as "curator" for him.

Certain acts were done by the father in assuming partners to carry on and work this lease of coal, and in forming what was first called the company of Walter Wilson and Co., and afterwards, when James Milligan and James Burnside were assumed as his partners, what was called the "Green Coal Company." To these arrangements the appellant was made to consent, although only from thirteen to fifteen years of age.

It was also stated that Mr Milligan, sometime after becoming a partner, became bankrupt in 1793. No steps were taken, however, to terminate Milligan's connection with the Green Coal Company. The concern, it was alleged, was neither dissolved nor was any notification to the public given, that Milligan ceased to be a partner. And, therefore, he

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continued a partner to all intents and purposes. The coal-work still continued under the management of Shiells (another partner) and the appellant's father. John Alexander was appointed Milligan's trustee, and had raised action, and obtained decree in absence, for certain sums due to Milligan by the Green Coal Company.

It appeared that Milligan carried on a different concern, with whom the respondent, Laidlaw, and others, were joined, under the firm of Milligan and Co. The Green Coal Company, acknowledged no dealings with Milligan and Co., but only with James Milligan as an individual; and the transactions had with him were solely individual transactions with him alone. It, however, appeared that Milligan had marked in the books of James Milligan and Co., certain sums as if advanced to the Green Coal Company, apparently to cover some cash deficiencies of his own. And in these circumstances, William Laidlaw, the surviving solvent partner of Milligan and Co., raised an action, against the appellant, for the sum of £336, 19s. 4d., as due that firm. To this last demand the appellant lodged defences denying the claim.

Mr Alexander, the trustee of Milligan, as an individual, brought also an action, *first*, for £845, 10s. 4d., as the balance, exclusive of interest owing to James Milligan, by the Coal Company, consisting of sums advanced, and £119 of interest, and *second* for £300, Milligan's share of profits in the concern.

Then followed the sequestration of the Green Coal Company. And this sequestration was afterwards recalled at the instance of the appellant, but only on condition of his making payment of the debts of the Green Coal Company due to the several creditors of that Company.

The appellant, on his part, also brought an action of reduction on the head of *minority* and *lesion*, against John Shiells, James Milligan, and James Burnside, Walter Wilson, and John Alexander, as trustee on the sequestrated estate of James Milligan, concluding for reduction of the missive or declaration, dated 4th April 1791, subscribed by Walter Wilson, whereby John Shields was assumed as partner in the lease, and declared to be one-half concerned in the said coal lease, and whole machinery and horses, &c., and also of the missives by Walter Wilson and Co., whereby James Milligan and James Burnside were assumed as partners of the Green Coal Company, to the extent of one-sixth share each. This action of reduction came to be tried before Lord Meadowbank, his Lordship pronounced this interlocutor:—"Finds

July 7, 1796.

"the admission by Mr Wilson, senior, of the defender Shiells, "into the benefit of the lease belonging to his son, the pur- "suer, while in pupillarity, and the subsequent transmissions "thereof, null and void *ab initio*, and, therefore reduces, "decerns and declares, in terms of the libel; but, *of consent* "*of the pursuer*, with this reservation and qualification that "before extract, he finds security to pay all the debts con- "tracted for behoof of the concern during the management "of these vitious titles."

Adjustments of accounts then took place, and it appeared that Walter Wilson had adjusted, docqueted, and signed accounts, by which the present claim was made to appear against the Green Coal Company, as a debt due to Milligan and Co.

Through the aid of his aunts, Misses Pettigrew, the appellant paid off the debts of the creditors above alluded to. And the appellant having settled such claims as he considered were sums *beneficially* and *profitably* laid out on his estate, he did not dream of being called under the reservation in the above interlocutor, nor under his bond in the recall of the sequestration, to pay every unjust and illegal demand that might be made. And, lest creditors of the latter class, among whom was the respondent, might take advantage of the above interlocutor, he brought a second action of reduction to annul the whole transactions, deeds, writings, *interlocutors* and *decrees* to his prejudice, bearing date prior to his majority; and *inter alia* the above interlocutor of consent as to payment of the creditors. At the date of this action, he was two years past majority, but clearly within the *quodriennium utile*, allowed to persons to obtain restitution against any deeds done to their prejudice during minority. These actions were conjoined.

As between Milligan's trustee and him, the appellant admitted his willingness to account on the principle, as in a question between partners, of giving credit for the sums actually laid out and expended by the "Green Coal Com- "pany," upon his coal-work, according as the amount should be instructed by their books and vouchers; and that upon the other hand the Company should account to him for the whole free proceeds of his coal intromitted with by them, during the existence of their concern, and, thereafter, by Mr Alexander, as trustee on their sequestrated estate, before he relinquished possession of the coal-work to the appellant in August 1797; and, further, that he was entitled to receive credit for the debts contracted by "Walter Wilson and Co.,"

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and the "Green Coal Company," which had been paid by his aunts to the amount of £2000.

Lord Hermand, Ordinary, pronounced this interlocutor:—"Having considered the accountant's report, objections "thereto for John Pettigrew Wilson, and whole writings "produced and referred to, with the summons of reduction "at the instance of the said John Pettigrew Wilson against "John Alexander and others, remitted to, and conjoined "with, this process. In respect, the admission of James "Milligan and others into a share of the coal-work lease, was "in a reduction at the instance of the objector, reduced and "set aside, and the lease itself, and, in particular, the objector's "interest therein, was acquiesced in and homologated by "him, when approaching to, and after he had attained "majority; that a minor, carrying on any trade or profession, "is not entitled to be restored against losses, or misfortunes "incident to such profession or trade; that large sums are "admitted to have been laid out in fitting the colliery, and "erecting machinery thereon, which must have been ad-"vanced by others, as neither the objector nor his father "were able to do so; that the decree of reduction was "qualified with the condition, that the objector should pay "all debts properly instructed against the concern, and the "books appear to have been kept with sufficient regularity "by a partner of the Company, who could have no interest "to state against it debts not truly due; and that, in a "minute, of date the 21st of May current, it is stated, in "the name of counsel for the objector, that he had no ex-"pectation of recovering any other writings than those "already produced: Finds that James Milligan, being found "to have been no partner, must be considered as a "creditor of the Company, for the sums advanced by him; "approves of the report; finds the respondent (Milligan's "trustee), entitled to payment of the sum of £940, 12s. 8d. "sterling of principal, with interest thereof, in terms of the "said report from 1st October 1792, and decerns. With "regard to William Laidlaw, finds, that as the debt originally "claimed by him, has been paid by Misses Pettigrew, upon "an assignation, there is no occasion for any determination "upon that point *in hoc statu*."

A representation having been made against this interlocutor by Mr Laidlaw, and by the trustee on the bankrupt estate of James Milligan, the Lord Ordinary varied the

June 23, 1803.

above interlocutor, in so far as to correct an error in the sum

decerned for, and decerned "for payment, to the representers, "of the sum of £1580 sterling, with interest thereof since "1st October 1792, deducting therefrom £321 as the amount "of the two bills paid on assignation," and repelled the reasons "of reduction.

A reclaiming petition having been brought by the appellant against these interlocutors, the Court pronounced this interlocutor:—"The Lords find, that although John Pettigrew Dec. 13, 1806. "Wilson and his cautioners became effectually bound to pay "all debts contracted by or for behoof of the Green Coal "Company, he did not thereby undertake to answer the "demands of the partners themselves, with whom he had "been duly associated while under age, unless in so far "as such demands could be legally and justly maintained "against him, on the footing of his estate being benefited "by their operations, or by the advances made by them "during the subsistence of the co-partnery; and find that the "said persons must be answerable for the intromissions of "one another, with the proceeds of his estate, and, therefore, "alter the interlocutors complained of, and in so far sustain "the objections to the accountant's report, and remit to the "Lord Ordinary." On another reclaiming petition, the Court so far altered as to find "that James Milligan's con- June 30, and July 1, 1807. "nection with the Green Coal Company expired upon the "sequestration of his estate on the day of March 1793, "and that the petitioner (Mr Milligan's trustee) is not "liable for the subsequent intromissions of the other partners "of the Company; and in so far alter the interlocutor re- "claimed against, but *quoad ultra* adhere thereto, and refuse "the desire of the petition, and remit to the Lord Ordinary "to hear parties farther as to William Laidlaw's claim." On another reclaiming petition from the appellant, the Court, of this date, advised the same, with answers from Mr Milligan's Jan. 17, 1808. trustee, and William Laidlaw, and pronounced this interlocutor, "Alter the interlocutor complained of, and find, that "James Milligan's bankruptcy did *not* relieve him from the "liability which he had previously come under, for intro- "missions of the partners with whom he had associated him- "self, as well subsequent to his sequestration, as previous "thereto: Find no expenses due to either party, and remit to "hear parties further, on the claims of William Laidlaw."

On reclaiming petitions from both sides, the Court adhered. Dec. 13, 1808. After these judgments had been pronounced, the trustee for Milligan's creditors proceeded no further, for it was obvious

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when the account as between partner and partner was stated between them, of debit and credit, namely, debiting the appellant with the sums expended on his coal-work, and allowing him credit, on the other hand, for the amount of the free proceeds of his coal, the balance would be greatly in his favour.

In regard to Laidlaw's debt, the action went on, and the appellant contended that it was impossible to draw any distinction between the debt claimed by Mr Laidlaw in right of James Milligan and Co., and that which was said to be due to Milligan as an individual. It was submitted that both of these claims stood upon the same footing; as James Milligan and Co. could not be considered as common creditors of the Green Coal Company, advancing money to that concern, and entitled to draw payment as strangers who made such advances; for, although it was possible that James Milligan might have borrowed from James Milligan and Co., part of the money paid in by him to John Shiells, yet this circumstance did not create a debt by the Green Coal Company to James Milligan and Co., betwixt whom directly, there had been no transaction whatever.

The Lord Ordinary pronounced this interlocutor, expressed
Feb. 28, 1810. in these words, "Having considered the whole process; finds, "That in repeated interlocutors of the Court, by which the "claim of the trustee for the creditors of James Milligan was "determined, there is an express reservation of the claim of "William Laidlaw, as the only solvent partner of James Milli-"gan and Co., so that his claim in that character remains entire: "Finds that James Milligan and Co. were not partners of the "Green Coal Company; so that the objection stated and sus-"tained against the creditors of James Milligan, who was a part-"ner, does not apply to William Laidlaw: Finds, that under the "bond granted as the condition of recalling the sequestration, "he is entitled to draw from them, in so far as he is a lawful cre-"ditor to the Company, payment of his debt, and allows parties "to be heard on the evidence and extent of such debt."

The appellant reclaimed to the whole Court, contending, "That Mr Laidlaw's present claim is of the same nature "with, and cannot be distinguished from the claim of the "trustee for James Milligan's creditors, and that the effect "of it must of consequence depend upon the issue of the "accounting between said trustee and the appellant."

Nov. 29, 1810. The Court, by a majority, adhered. On a second reclaim-
Dec. 21, 1810. ing petition the Court made a "remit to the Lord Ordinary, "to hear parties upon the allegation of the petitioner, that

"Mr Laidlaw's debt is already paid; but with this qualification, that before being heard upon the plea, the petitioner "shall make payment of the expense hitherto incurred by "Laidlaw; *quoad ultra*, refuse the prayer of the petition and "*adhere to the interlocutors reclaimed against.*"

The Lord Ordinary, under this remit, found that the defender "had failed in his attempt to confound the claim of "the respondent as solvent partner of James Milligan and "Co., with that of James Milligan, as an individual." And in a subsequent interlocutor, his Lordship found the debt Laidlaw claimed, "sufficiently instructed by the fitted account in process," &c., "and found the appellant liable in "£362, 9s. 3d. sterling, with interest from 1st October "1793." And on reclaiming petitions, the Court adhered.

June 20, 1811.

Dec. 3, 1812. Feby. 11, 1813.

Against these interlocutors the present appeal was brought by the appellant.

Pleaded for the Appellant.—The respondent's claim was, from the first, *irrelevant* and *incompetent* against the appellant. Supposing the existence of a debt or contraction by the Green Coal Company to Milligan and Co. had been once admitted, there were no *termini habiles* for making a demand for it on the appellant. The appellant was not a legal partner of the Green Coal Company, or liable for their debts. The whole judicial proceedings, in which a reservation was made of an obligation on the appellant to pay the debts of the Green Coal Company, and in which security for those debts was given, took place in his minority. These were grossly to his injury; and they fall directly under the second summons of reduction, which was brought *intra quodriennium utile*, and is now one of the actions appealed.

2. Neither could it be stated, that the appellant's estate was benefited by the advances which formed the subject of Mr Laidlaw's claim. On the contrary, Mr Laidlaw declined to prove, that they had been *applied* to the benefit of the appellant's property. Nor was the claim proved to be due to Milligan and Co., though the adjusted account signed by Walter Wilson, makes it appear so, yet, in point of fact, it was a debt due to James Milligan himself.

Pleaded for the Respondent.—1. The appellant's original plea, that the advances made by James Milligan and Co. to the Green Coal Company, were not applied to the appellant's benefit, is neither well founded in point of fact, nor relevant in point of law. For the appellant himself admits, in point of fact, that these advances were made to his

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father, Walter Wilson, and to Mr Shiells, then in the management of this coal-work, for the use and behoof thereof, and he does not aver, that either his father or Shiells applied them to any other purpose.

2d, Nor is the appellant well founded in maintaining, that this debt was truly due, not to Milligan and Co., but to the creditors of James Milligan, as an individual, because the docqueted account, signed by Walter Wilson, places that beyond all dispute.

After hearing counsel,

LORD REDESDALE, said,*

(His Lordship began his speech, by stating the proceedings out of which the former appeal arose, and afterwards the whole acts and proceedings out of which the present appeal arose, going minutely over the whole interlocutors on these causes; and then proceeded as follows:—)

"The result of the whole is, that the appellant has been found liable to pay to the respondent the sum of £362, 9s. 3d., with interest from 1st October 1793. The appellant does not deny that he is liable in payment of the debts due by the Green Coal Company to strangers. But he contends, that the debt claimed to be due to James Milligan and Co., of which Company the respondent is a solvent partner, if due at all, was due only to James Milligan, one of the partners of the Green Coal Company, and it has been already found by the Court of Session, that the appellant was not liable in the payment of debts of this description.

"The claim made by Laidlaw is founded upon this, that payments to the extent decreed for, were made to the Green Coal Company out of the cash of James Milligan and Co. Upon this, three questions arise, 1st, If these payments were really made at all. 2d, If they were made, whether they were made by Milligan as an individual, or by Milligan and Co.? 3d, Whether any payments that were made, were not repaid by a transaction upon certain bills mentioned in the case.

"Upon the first of these questions, whether the payments in question were really made or not, this is merely a question of evidence. The respondent relies mainly on the account docqueted on 2d September 1793, between the appellant's father and John Alexander, as acting for the respondent in the matter, which states a balance to the amount claimed, against the Green Coal Company.

"The objections to this are, that Wilson, the appellant's father, could not, by the signed account, bind the appellant, he then

* Taken by Mr Robertson.

being a minor. Wilson was not the proper person to settle such an account with. He was neither the cashier nor the accountant of the Company; and that a person of the name of Shiells was, and appears to have been, the cashier and accountant for the Company.

"There is no evidence whatever in the books of the Green Coal Company, of the greater number of the items stated in this settled account having occurred in any way; and those items which do appear in the books of the Green Coal Company, and in the settled account, are sums placed to the credit of Milligan, as an individual, not to the credit of Milligan and Co. Indeed, there is no account of Milligan and Co. in the books of the Green Coal Company.

"The respondent offered, in evidence, the books of Milligan and Co. in which the sums claimed are said to be entered as payments by Milligan and Co. to the Green Coal Company. But these books are no evidence against the Green Coal Company. It appears, too, that where receipts were given for the sums claimed, these receipts were given to Milligan, as an individual. Other sums, said to have been advanced by Milligan and Co., are entered by Shiells, as received of Burnside. Under these circumstances it appears to me to be clear that the debt now claimed, as far as it could be substantiated at all, was a debt due to Milligan alone, and fraudulently (as I have no doubt it was), entered by him otherwise in the books of Milligan and Co., to bind the appellant.

"Under these circumstances, it appears to me that there is no ground for charging this as a debt due by the Green Coal Company to James Milligan and Co. Indeed, the story is quite incredible, for what purpose should Milligan and Co. have advanced the sums claimed to the Green Coal Company to carry on their works? There was no reason for this. The probability, therefore, independent of any evidence, is, that it was the fraud of Milligan, to enter the sums in question in the books of Milligan and Co., as advances to the Green Coal Company, while the dealing (as far as any evidence appears) was between Milligan, as an individual, and the Green Coal Company.

"The appellant who, by a series of imprudent transactions, was rendered insolvent during his minority, cannot be made liable in this way for sums claimed by the respondent.

"An attempt was made to contend, that one of the interlocutors which was not appealed from, concluded this question: but upon going minutely through the interlocutors, I do not consider that it is so concluded. The interlocutor says, that Laidlaw might draw in so far as he was a *lawful creditor* of the Green Coal Company; but this decides neither as to the legality of the debt, nor the quantum of it. All the other interlocutors are appealed from.

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"The result of the whole in my view is, that there is no sufficient evidence of the advance of all the sums in question. Some of the claims made are not consistent with the entries by Milligan himself in the books of Milligan and Co. Others appear to have been accommodations granted to Milligan by the Green Coal Company, and none of the sums claimed seem to be sufficiently instructed as debts due to Milligan and Co.

"Under these circumstances, I think your Lordships cannot affirm the interlocutors which find that the appellant is liable in payment of £362, 9s. 3d. to the respondent, with interest from October 1793; but that he ought to be considered as discharged from the demands of the respondent, or on the part of Milligan and Co. If any thing is due to Milligan, as an individual, he can only be entitled to receive payment, as in a question between the partners, after the whole debts and accounts of the Green Coal Company are paid."

Journals of the House of Lords.

The Lords find, that there is no sufficient evidence of any advance made by the partnership of Milligan and Co. to the Green Coal Company, of any of the sums of money on which the respondent has founded his claim of debt, as solvent partner of the partnership of Milligan and Co. against the appellant; it is therefore ordered and adjudged that the interlocutors complained of in the said appeal, so far as the same establish any demand of the respondent, as solvent partner of Milligan and Co. against the appellant, be, and the same are hereby reversed: and it is further ordered, that with such finding and reversal, the cause be remitted back to the Court of Session, to do therein as shall be just.

For the Appellant, *Sir Saml. Romilly, John Cuninghame.*

For the Respondent, *Fra. Horner, John M'Farlane.*

NOTE.—Unreported in the Court of Session.—Professor Bell (Com. vol ii. p. 624) says, "In such cases it has been doubted "whether the father or the tutor do not, for himself, under-"take all the responsibility of the concern; and it rather seems "to be law, that they are to be held personally liable. So it "has been found in three cases." The first of the cases here referred to, is that of Pettigrew Wilson (now reported), and the Professor has a note describing that case thus:—"Pettigrew "Wilson's case referred to in subsequent cases, was a partnership "in coal, in which a boy of fourteen was engaged by his guardians. "It was held null and void, and the creditors not entitled to claim "upon it." There appears to be some mistake here. There was

no attempt made in this case to hold the father personally liable for the debts of the partnership; the question was solely as to the son's liability; and against him the creditors were held entitled to claim and recover their debts, making a distinction only between debts due by the Company to its lawful creditors, and those due to a partner. The principle of decision in the Court of Session, appears to have been, 1st, That the son was, at fourteen, a minor, not *proximus minoritati* merely, and as such, might engage in trade, and be liable for the obligations come under in the course of that trade. 2d, That the debts contracted by the Green Coal Company were beneficially expended on his estate, and, therefore, *in rem minoris versum*. No doubt one of the interlocutors in the earlier branch of the proceedings held the minor liable to pay the creditors only of *consent;* but this consent was not *sua sponte*, but of necessity, and in consequence of having in a previous process for the recall of the sequestration at his instance, succeeded in obtaining a recall of that sequestration, on condition of his paying the Company creditors. In the second reduction, by which he sought to reduce that *consent* as well as the other proceedings, on the ground of minority, the abstract question of his liability was again brought before the Court, but he did not prevail. The principle Professor Bell lays down, of holding the father or tutor liable in such a case, however equitable in itself, is made to rest on the *obiter dicta* of some two of the judges in the cases referred to; but there was no positive decision on the point.

The INCORPORATION of WRIGHTS, MASONS, and COOPERS of Portsburgh, . . *Appellants;*

GEORGE LORIMER, Mason at Laurieston, and THOMAS MILLER, Mason at Portsburgh, *Respondents.*

House of Lords, 29th June 1816.

PRIVILEGES OF INCORPORATION—INFRINGEMENT.—The Incorporation of Masons, Wrights, and Coopers of Portsburgh had exclusive privilege of practising these trades within the bounds of Portsburgh. A mason residing beyond the bounds, owned lands within the bounds, and proceeded to build houses thereon, though not a freeman. He had, however, a partner who was a freeman, Held, the working of these persons, in building on their own lands, was not a breach of the privileges of the Incorporation, without prejudice to the question, Whether persons not freemen, in building upon their own lands, can employ masons who are not freemen.

The Incorporation of Wrights, Masons, and Coopers of

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INCORPORATION OF WRIGHTS, &C. v. LORIMER, &C.

Portsburgh, possessed exclusive privileges within the bounds of Portsburgh, which comprehended the West Port, Potterrow, and Bristo, of carrying on their respective trades, and of preventing unfreemen from working there.

The freemen, on becoming members of the incorporation in order to entitle them to carry on their trades within the bounds, took an oath which, *inter alia*, declared that "they "shall not colour or fortify any unfreeman, or pack or peel "with him."

It appeared that the respondent, George Lorimer, mason at Laurieston, an unfreeman, had built no fewer than eight houses within the barony of Portsburgh; and he was, at the date of this action, carrying on other four buildings of the same description within the bounds in which they had exclusive privileges,—all these houses being built for sale. It was also stated he had executed a variety of jobs within the barony without acknowledging the Incorporation by paying fine, or submitting to their regulations. He was threatened with legal proceedings; and then he resorted to the expedient of taking into partnership the other respondent, Thomas Miller, an entered member of the Incorporation with the view of enabling him to carry on, without any objection, his trade.

In these circumstances, an action was brought at the instance of the appellants, concluding, 1st, To have it found and declared, that Thomas Miller had no right to enter into co-partnery with any person other than a freeman belonging to the said corporation, to the effect of communicating privileges which belonged to himself alone, and which could not be transferred to a third party, and to have him prohibited from so doing; 2d, That George Lorimer had no right or title to carry on buildings or any other work within the bounds of the said barony, which tended to encroach on the appellants' exclusive privileges; and to have him likewise prohibited from so doing within the bounds of Portsburgh; and, 3d, In regard they had refused to pay the usual fine to the Incorporation to have them decerned to make payment jointly and severally of the sum of £30 sterling, less or more, incurred by them in name of damages for the work thus illegally performed.

In answer, the following defences were stated: "The de- "fender, George Lorimer, some years ago, in conjunction "with the other defender, Thomas Miller, purchased a piece "of ground lying within the barony of Portsburgh, and,

"being himself a tradesman, he has built and repaired several "houses on his own property. He is the proprietor of the "grounds, and as such is entitled to use them as he thinks "proper. Nor does the circumstance of his being a mason "fetter him in the management of his property, or bring him "under the control of the pursuers.

"With respect to the other defender, Thomas Miller, he has "no interest or concern in this process. It was known to the "pursuers, at the time of his entering into the corporation, "that he was in partnership with George Lorimer; and the "defender has not, by packing or peeling, endeavoured to "screen his partner. The defender, Mr Miller, is a freeman "of this corporation, and therefore entitled to carry on his "trade within the barony of Portsburgh."

After various procedure before the Lord Ordinary (Armadale), his lordship reported the case to the Court, and the Court, of this date, sustained the defences and assoilzied the defenders. July 10, 1812.

On reclaiming petition the following interlocutors were pronounced: "The Lords having resumed consideration of "this petition, and advised the same with the answers thereto, "they were equally divided in opinion; and therefore they "supersede farther advising, for the opinion of Lord Arma- "dale, the senior Ordinary." Feb. 1, 1813. And the cause having been taken up, their Lordships, of this date, then pronounced this judgment: "The Lords having resumed consideration of "this petition, and advised the same with the answers thereto, "Lord Armadale, the senior Ordinary, having been called in, "they refuse the prayer of the said petition, and adhere to their "former interlocutor reclaimed against: Find the petitioners "liable in expenses of process; appoint an account thereof to "be lodged, and remit the same when lodged to the auditor "of Court to tax and report."* Feb. 5, 1813.

Against these interlocutors the present appeal was brought to the House of Lords.

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* NOTE.—Opinions of judges:—

Lords HERMAND, GILLIES, ARMADALE, and BALMUTO, were for assoilzieing on the ground that every man might work for his own use, and that the exclusive privilege did not relate to the buying and selling of houses.

The LORD PRESIDENT HOPE differed: "These men were build- "ing for sale. They are carrying on the trade of builders for the "market. In the other crafts, shoemakers, &c., it is an encroach- "ment to bring to market the made work of these crafts.

1816.

INCORPORATION OF WRIGHTS, &C. v. LORIMER, &C.

Pleaded for the Appellants.—1. If an unfree tradesman, like the respondent, Lorimer, is allowed to exercise his craft as a mason, for instance, in building houses within the barony of Portsburgh, there is an end put at once to the exclusive right and privilege which the appellants' incorporation has hitherto enjoyed within these bounds; and the judgment under appeal will form a precedent which will be completely destructive of the rights and privileges of all the incorporated crafts in Scotland.

It will be observed, that it is no trifling or incidental job of which the appellants complain; nor is it any erection made for the private use and accommodation of the proprietor; what has given rise to the present discussion, is a systematic plan of building a succession of different tenements, of great extent and value, for the *public market*. In the erecting of these houses, Lorimer has appropriated, in whole or in part, the profits of the mason work, to which, as an unfreeman, he had not the shadow of right, and of which by necessary consequence, the members of the corporation are defrauded.

2. If Lorimer is right in the plea that he may use his property as he thinks fit, and erect as many houses as he pleases, it follows that every other proprietor must be entitled to do the same thing. Any individual whatever, though bred up to no craft at all, and wholly ignorant of the mason trade, or any of the other trades necessary for completing a house, may purchase or feu a piece of ground, and after doing so, may have masons, wrights, and other craftsmen, not members of the incorporated trades, and with their assistance erect houses for sale without challenge—a mode of proceeding utterly destructive of the exclusive privileges of all crafts.

3. If the respondent, Lorimer, has encroached on the privileges of the corporation, it necessarily follows that the other respondent, Miller, by carrying on his trade in company with that person, has been guilty of "packing and peeling" in opposition to the rules of the crafts, and the special terms of his own oath of admission. Lorimer, though no freeman, is enabled, through the fraudulent collusion of Miller, to reap all the advantages of a freeman, by exercising his trade as a mason, and putting the profits in his pocket; and therefore

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"Just so here. These houses are the ready made work of the "trade of masons, wrights, &c. That is an encroachment."

Lords SUCCOTH and CRAIG had the same views.—*Hume's Collection of Sess. Papers*, vol. 116.

by so packing and peeling he has violated the rules of the Incorporation.

Pleaded for the Respondents.—It is no encroachment upon the privileges of any incorporation for a person to work for his own behoof, or build upon his own property. The exclusive privileges of any incorporation extend only to prevent artizans from working for hire for the behoof of others, or where there is a guildry, from dealing as merchants, or keeping shops for selling certain commodities. Any individual may, therefore, bake or brew for the use of his own family; kill meat, or employ his servants to do so, although he is not a freeman of any incorporation. He alone derives the benefit of his labour and exertions, and must suffer the loss if he shall happen to be unskilful in his trade. As the respondent, Lorimer, was himself a mason, he naturally assisted in carrying on the houses which he and his partner had resolved to build on the property they had purchased, and whether they shall retain the houses as their property, or let, or sell them, it is evident that they earned no hire as artizans, but worked for their own behoof.

After hearing counsel,

The Lords find, that the working of Lorimer and Miller as masons, in building on their own lands, was not a breach of the privileges of the Incorporation, although Lorimer was not a member of the Incorporation. And with this finding, and without any prejudice to any question which may arise in any other case, Whether persons not freemen of the Incorporation in building upon their own lands, can employ masons who are not freemen without violation of such privileges, it is ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed. Journals of the House of Lords.

For the Appellants, *Thos. W. Baird, Henry Brougham.*

For the Respondents, *John A. Murray, Henry Cockburn.*

NOTE.—The Act 9 Vict. c. 17, abolishes the exclusive privileges of trading in burghs.

1816.

STIRLING, &c. v. CAMPBELL, &c.

CHARLES STIRLING, Esq. of Kenmure, and Others, ... *Appellants;*

JAMES CAMPBELL, Esq. of Bedlay, and Others, ... *Respondents.*

House of Lords, 1st July 1816.

ELECTION OF MINISTER TO A PARISH—CASTING VOTE—PROOF—MINUTES OF MEETING AS EVIDENCE—MANDITORY—CURATOR—MINOR.—The election of a minister as assistant and successor, came to be exercised in the parish of Cadder. The appointment was vested in the whole heritors and elders of the parish. On the day of election thirty-two voted for Mr Grahame, and thirty-two for Mr Lockerby, and the preses gave his casting vote for Mr Grahame. The election having been objected to; Held, (1) That the vote given for Ann Reid, a minor, then seventeen years of age, per mandate of her curator alone, without her signature or consent, was inept. (2) That the objection to the vote of James Provan was bad. (3) That the preses had no right to a second or casting vote; and (4) That the minutes of the meeting could not be looked to as unexceptionable evidence of what took place, from the alterations made on them by the clerk, after the meeting was over; and (5) That the majority of votes was given for Mr Lockerby. In the House of Lords, the interlocutors were affirmed, except as to the second and fifth points, as to which the cause was remitted.

The election of a minister to the parish of Cadder was vested in the heritors and elders of the said parish, they having purchased the right of presentation thereto.

In 1811 the Rev. Mr Provan, the then incumbent, from age had become unable to discharge the ministerial duties of the parish, and he declared his wish, by letter, to resign a part of his emoluments, in order that an assistant and successor might be duly appointed.

A meeting of the heritors and elders was held, and agreeably to the request, they appointed the 5th September 1811 for the election of his assistant and successor.

On the 5th day of September the meeting was held according to appointment. Mr Stirling, one of the appellants, was called to the chair, and acted as preses of the meeting, and Mr Carrick was chosen clerk.

Three candidates appeared for nomination. Three of the electors voted for Mr Cumming, thirty-two for Mr Lockerby, and thirty-two for Mr Grahame. There being an equality

of votes for the two latter, Mr Stirling, the preses, gave his casting vote for Mr Grahame, and he was accordingly, by the meeting, declared duly elected.

Some of the heritors shortly thereafter, taking a different view of the election, among whom were the respondents, they protested against the election; and followed up their protest by two bills of suspension, which were respectively refused by Lords Justice-Clerk Boyle and Robertson. They then made application to the presbytery, to induce them to stop proceedings as to the call of Mr Grahame. But both the presbytery and synod repelled the objections stated, and ordered the call to be made.

They then brought the present action of declarator, in which they concluded, 1st, That James Purden Gray, who was entitled to vote at said meeting, and whose name was inserted in the original minutes as voting for Mr Lockerby, but whose name was illegally omitted in the extended minutes, ought to be restored in the minutes by the clerk of the meeting. 2d, That Ann Reid having been present at said meeting, a mandate, signed by persons alleging themselves her curators, addressed to Robert Stevenson, was irregularly entered in the said minutes of sederunt, and in the list of votes given in favour of Mathew Grahame; because a deed signed by the curators only, without the minor is null. That it should be found that the respondents being the legal and actual majority of the said meeting, and having declared their choice of Mr Lockerby, that he, Mr Lockerby, should be declared duly elected as assistant and successor to Mr Provan, in the parish church of Cadder; and that Mr Grahame was not duly elected. 4th, That supposing there had been an equality of votes, yet it ought to be declared that the election was still void, in respect Mr Charles Stirling, the preses of the meeting, had no right to a double vote, and that it was illegal in him to assume the right of giving such double or casting vote on that occasion.

The appellants stated the following defences, 1st, That matters had been conducted properly and regularly on their part; that the whole heritors at the conclusion of the election had formally given their votes in favour of the candidate whom they had previously supported, and solemnly agreed to join in a call, and to subscribe a presentation in favour of Mr Grahame. 2d, That the vote of Mr Purden Gray, whether his right to tender it was good or bad, had not, in point of fact, been tendered at all, and therefore could not be com-

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petently counted. 3d, That no objection had been made to the vote given in name of Ann Reid at the meeting, and that they were still ready to prove that she approved and concurred in what had been done in her name. 4th, That the casting vote given by the preses was authorized by an express and unanimous agreement of the heritors; and that at any rate, even if there had been no such agreement, the preses of such a meeting was entitled, both by law and custom, to give a casting vote. 5th, That one of the respondents, James Provan, was not duly qualified to vote, in so far as he had been divested of the property, in right of which his vote had been given, a considerable time before the election.

A condescendence of the facts having been given in, and a proof allowed and reported, the Lord Ordinary reported the cause with the proof to the Second Division of the Court; and the Court pronounced this interlocutor, "Having heard "counsel in their own presence, and having resumed con- "sideration of a petition for the defenders, to open the sealed "deposition of Ann Reid and Agnes Hamilton, refuse the "desire of the said petition; and on the merits of the cause "repel the objection proponed by the defenders to the vote "of James Provan: Find no evidence that a legal vote was "given or tendered for or on behalf of Ann Reid: Find also, "that Charles Stirling, Esq., had no right *qua preses* to a "second or casting vote; and that the minutes of proceed- "ings are not entitled, in the way they were completed, to be "considered as unexceptionable *prima facie* evidence of the "proceedings, and, therefore, without deciding on any other of "the points brought under discussion: Find, that the legal "majority of the votes was given in favour of Mr Thomas "Lockerby, and that the said Thomas Lockerby was duly "elected, and ought to be admitted and inducted assistant "and successor to Mr Archibald Provan as libelled; and "decern." On reclaiming petition, the Court adhered.

Feb. 9, 1813.

Against these interlocutors the present appeal was brought to the House of Lords, by those who had voted for Mr Grahame.

March 4, 1813.

Pleaded for the Appellants.—1st, That the minutes of meeting of the heritors of the parish of Cadder, being the formal certificate or record of the proceedings of that meeting prepared by their own clerk, are authentic legal evidence of the *res gestæ* of the meeting, and incapable of being impeached by parole testimony. 2d, If it were otherwise, it is in evidence that Mr Purdon Gray alleged to have voted, or to have

offered to vote for Mr Lockerby, voluntarily declined voting; and, at any rate, being a minor, Mr Gray could not have voted without the consent of his curator, who refused to concur with him. 3d, There is evidence that a vote was given for Ann Reid of Cleddans, by mandate of her curators. There is also evidence that she concurred in the appointment of the proxy, and approved of the vote given by him, and that vote being unobjected to at the time, and being expressive of the intention of every individual who had any interest in the property in right of which it was given, is a good vote. 4th, By the agreement of the meeting, the right of a casting vote in addition to his original vote was conferred on Mr Stirling, the preses; and even if such agreement had not been entered into, the preses would, by the common law of Scotland, have been entitled to a double vote. 5th, The vote of James Provan given for Mr Lockerby, must be set aside, inasmuch as James Provan was, previous to the election, formally divested of the property, in right of which the vote was given, by a regular delivered deed in favour of his brother, John Provan. 6th, From the circumstances stated, there was a decided majority of votes in favour of Mr Grahame.

Pleaded for the Respondents.—The paper bearing to be the minutes of the meeting of the heritors and elders of the parish of Cadder, on the 5th September 1811, is not entitled to bear faith in judgment. Because, after the meeting had been dissolved, the under clerk at the meeting had taken the minutes away, and altered various passages of the minutes, and he had, besides, made marginal additions thereto; and this, he admitted on oath, had been done by him. It was improper and incompetent for him to do so, even to correct a blunder, far less to alter the sense. Among these alterations was the passage which conferred on Mr Stirling the right to exercise a casting vote in the case of equality, and which, therefore, was interpolated and inserted after the meeting was over, and "from the deponent's (clerk's) own conception of what "Mr Stirling had said at the meeting." 2d, The vote given per mandate, of the curators for Miss Ann Reid, was null and void, and ought not to be counted. In the first place, because Ann Reid being then seventeen years of age, with curators, she was the party to act, and not her curators by themselves. She ought to have signed the mandate, and the mandate ought to have been her mandate, and not the mandate of her curators alone. The want of her signature to that mandate rendered it null and void, because, after

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twelve years of age, every act of the curators must have the consent of the minor, just as every act of a minor having curators, must, in order to render it valid, have the concurrence of the curator. 3d, In regard to the vote of James Provan, which was given for Mr Lockerby, this was a perfectly good vote. He had not then, in point of fact, divested himself of his property in favour of his brother. The conveyance to that brother was merely collusive, and devised to serve a purpose, and to screen his property from his creditors. At the moment of the election, the feudal investiture was in his person, and nothing had been done to take it out of it, and, therefore, he was publicly seized and infeft as proprietor. 4th, In regard to the casting vote exercised by Mr Stirling, two questions arise, 1. Whether, in point of law, he was entitled to give a double vote; and 2. Whether, in point of fact, he was authorized by the meeting to exercise such a vote. 1. There is no rule in the law of Scotland which vests the chairman or preses of such a meeting with any such privilege, as that of giving a double vote. It was a meeting of private individuals met to exercise a common right, in which each of them had an equal interest; and no proof has been offered, that in such a situation, the person placed in the chair, is entitled, by virtue of that office, to a double vote; nor, indeed, is there an instance in any court or assembly of men whatsoever, where such a right is vested in the chairman, except in consequence of express statute, or of long and inveterate custom. In the meetings of creditors, the preses has not two votes. In the law courts of the country no such thing is known; and, till the late judicature acts, the President of the Court of Session had not even an original vote, but merely a casting vote, when there happened to be an equality without him. In the House of Commons the Speaker has no original vote; nor the Lord Chancellor in the House of Lords. And in the Church Courts, the Moderator has no original vote. But, secondly, It is said that the meeting agreed to confer expressly on Mr Stirling, the preses, a double vote; this is totally unfounded. The meeting never agreed to any such thing, and it has been proved by the evidence of the clerk, who inserted this clause in the minutes, that this was done after the meeting was over, and from his own conception of what Mr Stirling had said, when he assumed the chair.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged, that the interlocutors com-

plained of, so far as they refuse the desire of the petition to open the sealed deposition of Ann Reid and Agnes Hamilton, and so far as they find no evidence, that a legal vote was given, or tendered, for, or on behalf of Ann Reid, and so far as they find that Charles Stirling, Esq., had no right *qua preses* to a second and casting vote; and so far as they find that the minutes of the proceedings are not entitled, in the way they were completed, to be considered as unexceptionable *prima facie* evidence, be, and the same are hereby affirmed: And it is further ordered, that the cause be remitted back to the Court of Session to review so much of the interlocutors complained of, as repels the objection proponed to the vote of John (James?) Provan, and in case the Court, upon such review, shall sustain that objection, the Court do review so much of the interlocutors as finds that, without deciding on any other of the points brought under discussion, the legal majority of the votes was given in favour of Mr Thomas Lockerby, and that he was duly elected, and ought to be admitted and inducted assistant and successor to Mr Archibald Provan, as libelled, and decerns, and before answer as to expenses, appoints the account to be given in: And it is further ordered, that after such review, the said Court of Session do order and direct as is just in all respects.

For the appellants, *Sir Saml. Romilly, Fra. Horner.*

For the Respondents, *John Clerk, James Moncreiff.*

NOTE.—Unreported in the Court of Session. Under this remit the Court repelled the objection stated to the vote of James Provan, and held the legal number of votes to be in favour of Mr Lockerby, and that he was duly elected.

JOHN ALEXANDER HIGGINS, W.S., and Others, ... *Appellants;*

JOHN HAMILTON COLT, Esq.; WM. HAMILTON of Westport, Esq.; SIR THOMAS LIVINGSTONE, Bart.; ARCHD. FERRIER, Esq.; Honourable WM. BAILLIE; SIR WM. AUGUSTUS CUNYNGHAME, Bart.; ANDREW BUCHANAN, and GEORGE MORE NISBET, Esqs., . . *Respondents.*

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HIGGINS, &C. v. LIVINGSTONE, &C.

House of Lords, 1st, July 1816.

ROAD TRUSTEES—LIABILITY FOR SUMS BORROWED—RELIEF.—Held, that mere presence at meetings of road trustees, at which certain things were authorized to be done, and contracts to be gone into in regard to the formation of a road, does not *per se*, subject such trustees in personal liability for the expense of the execution of these contracts, where the trustees are acting *ultra vires* of the powers conferred by the Act; and that the only acts which could bind trustees in such circumstances, would be the actual signing of the deeds or contracts by which the money was raised and the expenses agreed to be paid to the individuals by them. Affirmed in the House of Lords; the Lord Chancellor ruling, that where trustees, in such cases, confine themselves strictly within the powers conferred, the acts of the majority will bind the other trustees; but where they act *ultra vires*, then, the acts of the majority will not bind the minority, or the other trustees.

This is the sequel of the case reported *ante* vol. 4, p. 401.

It is there seen that this was an action raised by certain of the road trustees of the Edinburgh and Glasgow Road, by way of Bathgate and Airdrie, for advances made by them in the formation and prosecution of the road under the powers of an Act of Parliament, against their co-trustees.

The Lord Chancellor Eldon doubted very much, upon the principles laid down by the Court below, whether these trustees were entitled to relief against their co-trustees. In the first place, the sum authorized to be borrowed by their Act of Parliament had been exhausted, and, in borrowing any sum further, they were clearly not under the powers of their Act. The inquiry then came to be, upon what other principle could these trustees subject their co-trustees in personal liability. Was it by the mere attendance at meetings at which certain acts in regard to the roads were authorized to be done; or was it not only by authorizing the borrowing of money; but by actually signing the deeds or bonds for such money, that was to subject them in personal liability? His Lordship had intimated a very strong opinion, that the mere attendance at meetings by certain trustees, could not, *per se*, subject in personal liability for every and all the acts done by other trustees, and remitted *quoad ultra*.

The cause having thus returned to the Court of Session, the judgment of the House of Lords was applied, after remit by the Court, to the Lord Ordinary for that purpose. And his Lordship ordered the appellants to state, in a condescen-

dence, the *special grounds* on which they meant to contend that the defenders (the respondents) were liable for the expense of making the road.

After the condescendence was lodged, the Lord Ordinary ordered the case to be stated, in memorials, to be reported to the whole Court for their judgment.

The condescendence is specially referred to in the speech of Lord Eldon.

1. It appeared, 1st, As to Sir Alexander Livingstone, who was now represented by his son, Sir Thomas, that he had been present at several meetings of trustees, where committees were appointed to enter into contracts to complete the branch roads. At some of these meetings, committees were appointed to enter into contracts for making certain parts of the road, and for building bridges; that at others of the meetings, contracts already entered into were reported and approved of, and that Sir Alexander was one of those trustees who made some of these contracts, and who had subscribed them. He contended he had only bound himself as trustee. The Court found (13th November 1807) no acts condescended on, sufficient to make him personally liable.*

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* Opinions of the judges:—

Lord Justice-Clerk (Hope).—"Sir Alexander Livingstone was *active* as a trustee. But he had a right to be so in that character. He did not go out of, or beyond that character, or what it entitled him to do. His authorizing contracts was within that character. Suppose the movers in the business had laid down the whole £10,000 on the table, got on their own personal security, or any way, still the trustees had right, as such, to go on contracting on that footing. It would have been necessary to warn the trustees to take care not to exceed the £10,000, under pain of personal responsibility. Even if Sir Alexander Livingstone had contracted himself, it is not to be *presumed* that he meant to exceed the parliamentary fund. I doubt if he was even bound to the contractor beyond that fund, unless the contractor specially warned the trustees contracting with him, that he trusted them personally. The language of the contracts is quite that way. It states them in the character of trustees only, not as individuals; and it binds the subscribers and *whole other trustees*, not their heirs and successors. Now, how *could* they bind the *other* trustees beyond the parliamentary fund? The language of bonds is quite different. It binds them expressly both as trustees, and personally, and their heirs. The distinction at that time was meant, though it has since been overlooked. So I think Sir Alexander Livingstone

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2. John Hamilton Colt was called in the summons as liable for his father, Robert Colt, a trustee. Robert Colt had attended a single meeting of trustees. This meeting appointed a committee, which contracted for making a part of the road and some bridges, and it approved of a prior contract; but he had not signed any contract or bound himself personally in any instrument. The Court (12th November 1807) found no acts condescended on sufficient to make him personally liable.

3. Mr William Hamilton of West-Port, had attended meetings merely as a trustee having power to administer the Parliamentary fund. He was one of a quorum of five trustees who signed a submission or arbitration bond for ascertaining the damage done to lands occupied by the road. He also signed a contract as one of a quorum of three of a committee appointed by the trustees for constructing Torphichen Bridge, but in these, he only bound himself as a trustee. The Court found (13th November 1807) that no acts had been condescended on sufficient to make the said William Hamilton personally liable.

4. Mr More Nisbet was called as representing his father, a trustee. His father had attended one meeting of trustees, but it was contended he could incur no personal liability thereby. The Court found (13th November 1807) that no acts had been condescended on sufficient to make him personally liable.

5. Lord Polkemmet had only been present at two meetings of the trustees for carrying into effect the Acts of Parliament. At each of these meetings, committees were appointed to contract for certain districts of roads, and that contracts made by other committees were approved of. The Court (13th November 1807) found that no acts had been condescended on sufficient to make him personally liable.

6. Mr Buchanan had attended three meetings of trustees

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meant merely to give his personal trouble, and to leave it to the movers to find the money. I am, therefore, for assoilzeing."

LORD MEADOWBANK.—"I have rather a different view of the case. But I think the case still unprepared for judgment."

LORD JUSTICE-CLERK (HOPE).—"My notion was that mere attendance at meetings of trustees did not subject farther than in terms of the Act; yet I had as little doubt, on the other hand, that by certain acts done *privato nomine*, a person might make himself personally liable to a greater extent."

at which committees were appointed to contract to make the roads, but he had not signed these contracts, nor done any other act to render him personally liable. The Court (13th November 1807) found that no acts were condescended on sufficient to make him personally liable.*

The Court, on reclaiming petition, pronounced this further interlocutor as to all the cases:—"Alter their interlocutors "reclaimed against, in so far as to find that the deceased Sir "Alexander Livingstone was personally liable, and that the "said William Hamilton is also personally liable in payment "of the sums demanded, and in relief to the pursuers *for the "expense of such contracts or deeds as they severally signed*, "but to no further extent; but, *quoad ultra*, adhere to said "interlocutors, and refuse the prayer of the several petitions "against these two defenders; and as to the whole of the "other defenders (respondents) above named, the Lords "adhere to these interlocutors reclaimed against, and refuse "the prayer of the respective petitions; but supersede extract "till the third sederunt day of May next." Mar. 8, 1808.

Against these interlocutors the present appeal was brought to the House of Lords, Mr Hamilton, and Sir Thomas Livingstone brought a cross appeal.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,†

"In those cases with respect to the trustees of a road, I am to trouble your Lordships, with reference to some interlocutors, which are appealed from in the case of Higgins *v.* Livingstone. My Lords, some years ago this cause came before us from the Court of Session, upon the appeal of Mr Higgins, who states himself to be assignee in trust of the Honourable Henry Erskine of Almondell, the Honourable Sir William Honyman of Armadale, Bart., one of the senators of the College of Justice; Alexander Majoribanks of Majoribanks; Matthew Sandilands of Couston; Thomas Shairp of Houston; Andrew Stirling, late of Drumpellier; William Sharp of Kirkton; the deceased Sir John Inglis of Cramond, Bart.; the deceased Colonel John Hamilton of Pencaitland, and the deceased William Waddell of Easter Moffat, trustees for making the road from the New Bridge over the water of Almond, on the confines of the counties of Edinburgh and Linlithgow, to Baillieston, in the

* The case of Sir William Augustus Cunynghame, was dealt with in the same way, as standing in *pari casu*.

† From Mr Gurney's Short-hand Notes.

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county of Lanark, in an action which was brought against Sir Thomas Livingstone, Bart.; Archibald Ferrier; the Honourable William Baillie; Sir William Augustus Cunyinghame, Bart.; Andrew Buchanan; William Hamilton; John Hamilton Colt, and George More Nisbet, Esquires, and Others, also trustees on the said road, who are now the respondents.

"My Lords, an Act of Parliament had passed, which had enabled various persons, to make a road in a part of Scotland, which I need not describe to your Lordships, and it appeared, I think, that the only fund which was provided by the original Act of Parliament for making this road, was a sum of £10,000, which the trustees were empowered to borrow on the tolls and duties, which they were authorized to levy on the road. Your Lordships will recollect, that the proceedings stated a great variety of transactions which had been had, by these trustees, at a meeting on the 2d of June 1792, another on the 14th of July 1792, another on the 27th of August 1792, another on the 6th of October 1792, another on the 10th of November 1792, another on the 28th of December 1792, and at various other periods; and one fact was extremely clear, that the expenses of the roads, and the undertakings which had been contracted for, very much exceeded this sum of £10,000, and those expenses were incurred long before the toll or duties could be collected; those duties could not be collected till the road was made and some parts opened. Certain of those trustees, having paid very large sums of money, after Parliament had, I think, in one or two instances, added to the amount of what they were entitled to raise under the first Act of Parliament; this proceeding was instituted in the Court of Session, for the purpose of having relief against the other trustees, and that was sought in a libel or declaration, which, after narrating the several Acts of Parliament, proceeded to state, that certain persons therein mentioned, trustees under those Acts, did, accordingly, convene for the purpose of putting the same in execution, and held their first meeting at Bathgate, in the month of June 1792, and thereat, and at sundry general and adjourned meetings held by them, the trustees did order and direct surveys and plans of the said roads and others to be made and reported to them; and after fixing upon what appeared to them to be the best line, and most calculated for the purpose of public utility, they appointed several of their number committees, with powers and for the purpose of contracting for the making and upholding particular districts of the said road, with the bridges thereon. That in virtue of the powers so committed to them, the said committees did enter into sundry contracts and agreements, for making and upholding the particular district roads allotted to them, with the bridges thereon, and various necessary particulars connected therewith, by which contracts and agreements so entered into, the said committees bound and obliged

themselves, and the whole trustees acting under the said statute, to make payment to the contractors and undertakers, of several sums of money as the agreed on prices and rates of executing the several parts of the said roads, and others, so committed to them, and which contracts and agreements so entered into, were regularly reported to the said trustees, at their general meetings, and after receiving their sanction, and being approved of by them, were, by their orders, engrossed in the sederunt-book of the proceedings under the trust. The libel then stated the stipulation of the Act of Parliament, by which it was provided, that the owners and occupiers of the lands through which the roads passed, should be indemnified for the damage they might sustain, the manner in which the amount of damage was to be fixed, was narrated, then the borrowing of the money, and the application of it to pay the joint obligations of the whole trustees, the refusal of certain of the trustees to pay their proportions of the common debt, in so far as it had already been made good to the contractors, &c., or to find security for that part of it which might still remain due; and the conclusion was to this effect, that it should be found and declared by decreet of the Lords of our Council and Session, that the defenders, and each of them, were bound to free and relieve the pursuer's constituents of a proportion of the sums borrowed and applied, or to be borrowed by order of the trustees, for the purposes of the trust, and for which they were, or might be bound by the bonds granted, or to be granted for the same, or otherwise, to the creditors of the trust; also of the sums which might still be due to the proprietors or tenants of lands, or others having, or who might thereafter have, claims against the trust. And it being so found, that the defenders ought and should be decerned and ordained by decreet foresaid, to make payment to the pursuer of the sum of £1000 sterling each, or of such other sum as should, in the course of the process to follow thereon, be found to be the proportions thereof effeiring to each of the defenders, or the predecessors of such, whose representatives were called, and that, at and against the term of Lammas next, 1797, with the legal interest thereof since the term of Martinmas 1796, till payment, in order that such sums to be paid up, might be applied towards paying off the principal sums borrowed, or to be borrowed as aforesaid, and interest due or to become due thereon, and the claims that might still be outstanding against the trust, or that might become due by the same, and so the pursuer's constituents be thereby freed and relieved of their obligations for the said borrowed money, and otherwise to the creditors of the trust, and the same cancelled to the extent of the sums so paid up, and failing their paying up their proportions in manner foresaid, then that each of the defenders so failing, should be decerned and ordained by decreet foresaid, to find sufficient security to the pursuer as trustee foresaid, for re-

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lieving his said constituents, and their heirs and successors, of the proportions of said debts, effeiring to each of the defenders as aforesaid, and of all cost, skaith, or damage, his constituents, or their foresaids, might anyhow incur or sustain, by being bound in the said bonds, or otherwise, to the creditors of the trust, in manner before mentioned.

"My Lords, the first judicial proceeding in this action was, that upon the 15th of November 1799. The Lord Ordinary, previous to the hearing, appointed the pursuer to give in special condescendences of the grounds upon which he meant to support his claims against the different defenders, together with copies of the obligatory clauses in the contracts for making and repairing the roads, and in the bonds for the money borrowed by them for that purpose. The different contracts, as some of your Lordships may remember, varied very much in their terms; some of them being contracts which bound the parties contracting, their heirs, executors, and successors; others being contracts which bound the parties describing themselves as trustees, and the first part of this interlocutor seems to have proceeded on this principle, that taking it to be true, in point of law, as it has very often happened in point of fact, that where there are parliamentary trustees, with a power to pledge the funds for carrying on the concern, with relation to which they become trustees; it is, nevertheless, competent for them to bind themselves as individuals; but the Lord Ordinary, thinking that the true principle of law might be, that those who had bound themselves personally, not merely in the character of trustees able to pledge the trust-fund, but that those who had bound themselves personally in aid of the fund, in case the fund was insufficient, or in such a manner, that the parties with whom they dealt, were under no obligation to look to the fund, but to the personal obligation of the party, although they might personally undertake, yet, if they thought proper to come into a Court of Justice to make others relieve them by contributing as if they were liable, it was on the pursuer to show that the other parties had contracted that liability which trustees may be said *prima facie* not to contract.

"When this cause came before the whole Court, on the 12th of December 1799, the Lords found it proved by the minutes referred to, that the trustees assembled at meetings held under the Act of Parliament for making the roads in question, appointed committees of their number, with power to enter into contracts and agreements relative thereto, in consequence of which, and of the contracts and agreements thus entered into, a great expense was incurred, which made it necessary to borrow considerable sums of money upon the credit of the tolls, and upon the private credit of the pursuers; that the pursuers were entitled to a proportional relief, from the other trustees, called as defenders in this

action, who were members of those meetings, and as such, either gave their concurrence in appointing committees, with powers to contract, or afterwards homologated and approved of those contracts and agreements, entered into, for carrying the resolutions of the general meetings into execution, and remitted to the Lord Ordinary to proceed accordingly.

"The defenders gave in a reclaiming petition against this judgment, which was appointed to be answered by the pursuers, and upon advising these, the Court pronounced this interlocutor:— Feb. 18, 1800.
'The Lords having advised this petition with the answers thereto,
'and the minute this day given into Court, on the part of the
'petitioners, they refuse the desire of the petition, and adhere to
'their interlocutor reclaimed against.'

"The cause then went back to the Lord Ordinary, who made the following order:—'Having considered the interlocutor of the May 14, 1800.
'Court of 12th December last, ordains each of the defenders to
'state, in a special condescendence, the particular circumstances,
'by which he alleges he does not fall under the findings of the
'interlocutor, and that against next calling.' Thus the nature of this proceeding was entirely changed, because the Lord Ordinary was entirely of opinion, that it became the pursuers to state the circumstances, from which they inferred the defenders were liable, and that seemed the more reasonable course, because this was not a proceeding against all persons, who had been present at the meetings, but against a considerable number of them, who had not been present at the meetings. It will be in your Lordships' recollection, that this cause was remitted from this House to the Court of Session, and the interlocutor of the Court of Session has given the Lord Ordinary a different rule of procedure, calling on him to consider, that those who were present at the meetings, were to contribute a proportion of relief, to those who made the payments, unless they could show they were not liable, although present at the meetings.

"When the case came to be discussed before us, as it appears by a paper I now have in my hands, your Lordships will recollect this House was attended by two noble and learned Lords now dead, who delivered their sentiments, and it was felt a matter of infinite importance, as well as difficulty, to say, that a man, who went into a room, where trustees were sitting, merely to inquire after the health of a person *there*, was to be taken to be liable, not only to the extent of any trust fund he had to administer, for all the purposes of which that meeting was ordained, but that if it happened, that the meeting should have allowed or homologated any contracts in the course of that meeting, while he was not present, and that if, in the execution of these, other matters arose out of them, he must be considered as personally liable to all the parties that dealt with the trustees, and would have to contribute

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to relieve the trustees who were made liable. Your Lordships will recollect one or two cases that have occurred in point of fact, which tend to show, that this matter ought to be sifted to the bottom, before we act on it.

"There is a gentleman, one of these trustees, of the name of Russell, who, I think, had, in the course of all those proceedings, gone once into the room to ask a friend, who was there, after his health, and the clerk put down his name, just as your Lordships take notice of a Peer's attendance here, whether he votes or not; and there were other trustees, one particularly, who was a trustee merely in respect of an office he held in some burgh, and who held the office for the time being, and if this man, who, I believe, was a provost, had gone into the meeting, on the last day of the year, in which he was serving in his official character, if it was only to have a conversation with a friend he had not seen for years, the clerk would put down his name immediately, and this would render him liable to all the consequences I have before stated.

"My Lords, upon the former occasion I do not recollect that the counsel at the bar were able, nor was I able, to furnish, nor am I now able to furnish any case which has occurred in this part of the Island, on such a subject, though I have made some inquiries, except a case which, in this paper I hold in my hand, which I see is a little misnamed, called Forster *v.* Bell, whereas the name is Horsley *v.* Bell, of which there is a printed note in Brown's *Chancery Cases*, 101, and of which I have a note furnished me by the learned gentleman now at your Lordships' table, in which Lord Bathurst, with Mr Justice Ashurst and Mr Justice Gould, held 'that a bill might be filed by a person who was the under-'taker of a Navigation Association at Thirsk, in Yorkshire, against 'the commissioners named in the Act of Parliament for carrying 'it on, who had signed the several orders." Your Lordships will permit me to beg your attention to that circumstance, that they had signed the several orders. Three questions were agitated at the bar. The first question was, whether the defendants were personally liable; the defendants contending that they were exercising a public trust, and that the credit was given to the undertaking itself, not personally to them, that the remedy was, therefore *in rem*. Secondly, Whether all who had been present at any of the meetings, and had signed some, but not all the orders, were liable as to all the orders, or only as to those which they had respectively signed, or his remedy was merely at common law? With respect to the third question, the learned judges who advised, the Chancellor and the Vice-Chancellor who was advised by those learned judges, disposed of that, by saying, it was much more convenient to come into equity, than to go to common law.

"My Lords, on the authority of one of the learned lords now dead, I think I am justified in saying, that this case is not very

satisfactorily decided; but I think your Lordships will be ready to concur with me, when I say, that, with respect to the original orders that were given by the commissioners, if you are to hold that the commissioners, who signed the orders, are to be taken personally to contract with the other party, to the agreement into which they entered, and not to pledge the fund, that it is a very different thing to say the commissioners who signed the orders are to be considered as personally contracting, and to say that a person who signed no such contract, is to be held personally to contract also. My Lords, if this case is to be understood, with respect to those orders which were not signed by the commissioners in this limited sense, namely that the commissioners were taken to be bound by orders which they had not signed, but which were recognized in orders they had signed, that is a very different case, to be sure, from holding that parties were bound merely by their presence at these meetings. Now, my Lords, if I had had the honour of attending in that case, in any judicial character, I should have said that persons who are to execute a parliamentary trust, when they meet for the purpose of executing that parliamentary trust, and when they state, on their contracts, that they do mean to act in the execution of that trust *prima facie*, this ought not to be taken to make themselves personally answerable; on the other hand, this stands on the books very strongly, I think, that inasmuch as trustees for the execution of a parliamentary trust, must have a knowledge, whether they have, or have not a fund applicable, and sufficient for the purpose of their trust, when they enter into a contract with other persons, who cannot, or probably do not, know whether they have a fund applicable and sufficient for that purpose or not; that they may well enough, I think, in fair reasoning, be taken to act as if they were representing, that they have a fund applicable and sufficient for that purpose, and, therefore, if there is not a fund applicable and sufficient for that purpose, that they would be personally bound to find such a fund. I think, also, that it is perfectly consistent, in all fair reasoning, to say this, that if they chose to enter into contracts, the terms of which are to make them personally responsible, that is, binding upon themselves personally, they may do so, and this will be binding upon them.

"When this matter came to be discussed before this House, on the former occasion, the House was of opinion—it must have been of that opinion, or I cannot see any reason for which we sent the matter back to the Court of Session—that the mere presence at these meetings was not enough to subject the party to this contribution; or what I take, for the purpose of this cause, to be the same thing, the payment of the tradesmen who had made assignation of their debts: for the fact that there had been minutes of all these meetings, and that the minutes of all these meetings exhibited the names of all these persons, as having been present, as

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well as the names of others, who are not made defenders, was as much before the House as it could be, in consequence of any remit whatever, and, therefore, if it could be taken as a sufficient ground for charging the defenders, that they had been present, it is impossible we could be thought to act rationally, in sending it back by such a remit, as that which I am about to mention to your Lordships, which the House made—and when your Lordships consider the difference between persons signing orders which are to call for and justify the expense, and the fact of persons coming in, in the course of a meeting of trustees, the distinction is most obvious, and most obviously important. I may go into a meeting at the time when that meeting first commences, to state my opinion of a particular thing, as appears in the case of Lord Polkemmet and others, who went in to state that it would be better to go on the north side, instead of the south side of a bog, whereupon those persons immediately leave the meeting, and in the course of that meeting, when they were no longer present (for the minutes do not enable you to guess what part of the meeting they were present at, and what part they were not), and in their absence, contracts, imposing great expenditure, are authorised; and merely because authority was given at these meetings, that those contracts should be entered into, it is said that they are to be made liable. If they are made responsible, in these circumstance, I say it would be one of the hardest doctrines one can imagine, as belonging to the execution of a public trust of this sort.

"For the reasons which were then very much detailed, which I shall not trouble your Lordships with now, this House ordered, 'That the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, of the 12th December 1799, and the 18th of February 1800, generally, and to find from which of the defenders, and in respect of what particular sums as to each of them, the pursuers, and which of them are entitled to proportional relief, and by reason of what acts each such defender became personally liable, and in what sums the defenders are respectively personally liable to contribute to such relief,' and the interlocutor of the Lord Ordinary was necessarily reversed.

"Your Lordships will recollect this remit was made by this House, perfectly cognizant of the effect and contents of all these minutes; and if this House meant to say, that because A was at this meeting, and B was at this meeting, and C was at this meeting, or were at the meeting at some particular period during which it was held, therefore the presence of A B and C at such meeting, was sufficient to fix those defenders with this demand of contribution, the House acting reasonably, ought to have said so at the time, and not to have sent it back, merely to state to the Court of Session again, that of which this House was perfectly cognizant,

that the minutes did import so and so; because your Lordships will allow me, with respect to these meetings under trust Acts of Parliament, and with respect to meetings of trustees in Scotland to observe, that meetings of majorities have larger powers than such meetings have in the southern part of the island. Your Lordships observe where trustees are appointed under an Act of Parliament, if they confine themselves to the object of the Act of Parliament, at their meetings, that is, if their meetings, for instance in the present case, had interfered with nothing but the application of the funds, which, as trustees under the Act of Parliament, they were entitled to raise and apply, then the resolutions of the majority of those present would bind the others; but, at such meetings, if they think it proper to enter upon the consideration of subjects that do not belong to the strict execution of the trust, in respect of which they are trustees, *there*, I apprehend, the acts of a majority of the trustees will not bind the minority; and if the majority thought, or any part of it thought fit, to make themselves, by their contracts, personally responsible, it would not be enough to say, that, at such a meeting, the majority had bound themselves; but in order to show the minority were bound, they must go on to show, by what individual acts, by what species of concurrence, by what kind of homologation, by what kind of approbation, these individuals became parties, not for the execution of the trusts of the act, but for the execution of the acts for which they were to be made responsible. If I am right in this interpretation of the remit made, your Lordships will find, by looking at what has since passed, and I begin with that of Sir Alexander Livingstone, the manner in which the remit has been applied, is this, that the pursuers, with respect to Sir Alexander Livingstone, except as to a particularity which belongs to his case, and Mr Hamilton's, which I shall name presently, say, 'The debts in respect of which the 'memorialist claims this relief, the Acts by which Sir Alexander 'became personally liable, and the sums in which it is appre-'hended his representatives are liable to contribute such relief, 'are as follows:—Sir Alexander was present at a meeting of the 'trustees upon this road, held of this date. This meeting ap- Nov. 1792. 'pointed Mr Majoribanks, Mr Gibbon, Mr Sandilands, and Mr 'Young—Mr Gillon, convener, a committee to contract for the 'Linlithgow branch road, there were fifteen trustees present at 'this meeting; this branch road was accordingly contracted for; 'the forming of the whole was executed by James Carlyle, under 'a contract entered into with this committee, and the expense 'amounted to £191, 19s. 2d.; the contract was approved by an 'after meeting, on the 17th of August 1793, where one trustee, 'Mr Sharp, was present, who was not at the meeting which ap-'pointed the committee, so the expense of forming this branch 'road falls to be borne by sixteen persons, and Sir Alexander

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'Livingstone's proportion, accordingly, is £12. The metalling 'was done in small lots; one lot was done under contract with 'John Wardrope, which was approved by a meeting on the 3d 'of August 1793, where there were four trustees present, who 'were not members of the meeting which appointed the com- 'mittee, so the expense of the contract with Wardrope, amount- 'ing to £189, 13s. 10d., falls to be borne by nineteen trustees, 'and Sir Alexander's proportion is £9, 19s. 3d.,' and then the 'rest of the condescendence, as to the particulars is a condescen- dence, stating divers and sundry subsequent meetings, together with the number of trustees present at each of those meetings, and dividing the expenditure authorized by each meeting into so many parts, as are equal to the number of trustees present at the meeting, and allotting to each his proportion—Sir Alexander Living- stone was certainly at a great variety of the meetings, and took an active part. With respect to my Lord Polkemmet, it is stated, that he was present; I ought, however, to mention to your Lordships here, that they then further proceed to insist, which they do in all the cases for each of the defenders, that any person who has authorized any part of the road, must be answerable for the whole, a proposition which seems to me wonderfully large, but they say, inasmuch as you knew that the road was to go from A to B, you who authorized a part of that road to be made even though only a mile, or half a mile of it, must have known that the whole of it was to be made, otherwise your half mile was useless, and, therefore, you must be taken to have authorized the making of the whole. It would be difficult on any principle or authority, to bind a man so down. They then further say, that if it shall be found, that others of the defenders are not liable, in the way, in which, by their condescendences, they seek to make them liable, those of the defenders, who are found liable, must be charged more than they are charged, on the supposition, that the others would be liable, because if some of those other defenders are not charged, then the expenses will be divided among fewer persons, and the proportion will be larger than stated in these condescendences.

"My Lords, my Lord Polkemmet was present, I think, at two meetings; he was present at the meeting on the 28th of December 1792; and was one of the thirty trustees who, upon considering the report of the committee appointed to consider of two lines of road, which had been proposed, approved of one of those two lines, and appointed a committee of ten trustees, to carry it into execution, three of whom were to constitute a quorum; and he is likewise stated to have been present at another meeting; and then looking at the number of trustees who were present at those other meetings, and the sums that were expended in consequence of those meetings, they assign to him his proportion of the expenses.

"There is a paper, and a very able paper, printed on the part

of my Lord Polkemmet, and he there states the circumstances under which he had twice attended, and his entire ignorance of this expenditure; he admits his having been at these two meetings, with reference to two particular objects he had in view, but he submits he was not at all cognizant of the nature of these contracts, and says, that when these two objects, on which he attended, were disposed of, he left the place, and the meetings are at a distance of a year and a half, between the periods, at which they were respectively held, in which intervening time, he took no part, and this is a cause of considerable surprise to him.

"Sir William Augustus Cunynghame was present at two meetings. Mr Buchanan was present at three meetings, and there is a letter of his, which seems to import a notion in his mind, that he was not only bound, but that it was reasonable he should make some contribution; he says, it was represented to him as the opinion of counsel, that he was liable, but on better consideration of the subject, he states, he is not liable, and I think I may venture to state, that the general ground on which, with the exception of one defender of the name of Hamilton, and Sir Alexander Livingstone, they are sought to be charged as liable, is, the circumstance of their presence at these meetings. One of them is a very remarkable case—Mr Nisbett's ancestor was present on the 5th of October 1793, and by reason of that presence on the 5th of October 1793, he is sought to be charged with the effect not only of the contracts that were then entered into, but with all the proceedings that meeting had homologated.

"My Lords, the question here is this, whether it is possible for your Lordships to say, that, considering what was the meaning of your own remit, the Court of Session, in the interlocutor I am now about to state, have miscarried. My Lords, it is one way of treating this case to say, I will, after such a remit, content myself with a condescendence which states little more than that the parties had attended these meetings, and another to allege, by way of condescendence, not only that the parties were at those meetings, but that, *de facto*, A took such a part, B signed such a contract, and C transacted such and such business with his brother trustees, with a view to state not that there was a mere presence and liability as resulting from it, of which your Lordships, by the remit, appeared to me to have considerable doubts. It was not thought sufficient to charge the trustees against whom nothing more could be alleged than that they were present at meetings. But your Lordships meant by the remit to proceed, thus:—Sir Alexander Livingstone was *there*, he did *such* and *such acts*, he was a *party* to such a *measure*, and so going through the defenders respectively, this would have met the idea, your Lordships entertained at the time of the remit; but I conceive your Lordships could not have meant to send it back, to say, that the *mere presence*

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would make the parties liable, the House having, as I have before observed, felt, when it made this remit, that these very minutes proved the fact of their attendance, which was just as good authority for the House to decide upon, as leaving it to the terms of such a remit as this.

"My Lords, after this remit, the first judgment, the Court of Session gave, was this:—'On report of Lord Craig, and having 'advised a memorial for the pursuers, with the counter-memorial 'for Sir Thomas Livingstone and for Archibald Ferrier, Writer 'to the Signet, common agent, appointed for carrying on the 'process of ranking of the creditors of the deceased Sir Alexander 'Livingstone, and the whole former proceedings, together with 'the remit from the House of Lords, the Lords find that no acts 'have been condescended upon sufficient to have rendered the 'deceased Sir Alexander Livingstone the predecessor of Sir 'Thomas Livingstone, personally liable in payment of the sums 'demanded, or in relief to the pursuer: Therefore, recall their 'interlocutors of the 12th December 1799, and 18th February '1800, appealed from' (these are the interlocutors that had been remitted), 'sustain the defences, assoilzie the said Sir Thomas 'Livingstone from the passive title as legally charged to enter 'heir, in respect of the renunciation now produced in process: 'And farther, in respect of its being found that Sir Alexander was 'not personally liable, find that the pursuer is not entitled to have 'any decreet, *cognitionis causa*, pronounced in his favour: As 'also assoilzie the said Archibald Ferrier as common agent afore-'said, from the conclusions of the action, and decern: Find no 'expenses due, and appoint the condescendences, answers, replies, 'and duplies given in before the Lord Ordinary, to be withdrawn, 'and to make no part of the proceedings in the cause.'

"My Lords, a similar interlocutor was pronounced by the Court in each and every of the cases of these defenders: Against these several interlocutors so pronounced, petitions were presented complaining of them, and particularly one complaining of the interlocutor as applicable to the case of Sir Thomas Livingstone, one of the defenders in this petition, and 'upon advising these petitions, with answers thereto for Sir 'Thomas Livingstone, and the common agent in the ranking of 'Sir Alexander Livingstone, his father's creditors, and having 'also resumed consideration of the several petitions for the pur-'suer, against Sir William Augustus Cunningham, the Hon. 'William Baillie of Polkemmet, John Hamilton Colt, William 'Hamilton, Andrew Buchanan, and George More Nisbett, Esqs., 'defenders, the Court alter their interlocutors reclaimed against, 'in so far as to find that the deceased Sir Alexander Livingstone 'was personally liable, and that the said William Hamilton was 'also personally liable in payment of the sums demanded, and in

'relief to the pursuer for the expense of such contracts or deeds, 'as they severally signed, but to no further extent, and to that 'extent they found the pursuers entitled to have decreet *cognitionis* 'causa against the said Sir Thomas Livingstone, and remitted to 'the Lord Ordinary to proceed accordingly. But *quoad ultra* 'adhere to the said interlocutors, and refuse the prayer of the 'several petitions against these two defenders, and as to the whole 'of the other defenders above-named, the Lords adhere to their 'interlocutors reclaimed against, and refuse the prayer of the 'respective petitions, but supersede extract till the third sederunt 'day of May next.'

"Now, it appears to me, that if they have proceeded upon this principle, that if you condescend and prove nothing more against the defenders, than merely showing by the minutes of the clerk of the meeting, that at some period of that meeting A B came in where the meeting was held, that is not enough to charge him as personally liable, but if, on the other hand, individuals make themselves *parties to contracts* and deeds, which, in terms, pledge them to personal responsibility, or which ought to be considered as making them personally liable, because if there was a fund, that fund ought to be produced by them, and if there was no fund, they must be taken to have acted with the persons with whom they contracted, as if there was a fund, that they were to apply to the purposes of the contract; I say, if they proceeded on these principles, that accounts for what has been thought unaccountable; for the distinction which Judges below make between the case of Sir Alexander Livingstone and William Hamilton, and those other pursuers and defenders, and the personal liability of these two must be taken in my view of this case to arise, not from the circumstance of their having been present at the meetings, but because their personal liability is founded on the deeds and contracts which they executed, and which deeds and contracts are themselves evidence, that they did concur in those objects of the meeting with reference to which it had been stated the other defenders were not personally liable. I can find nothing with respect to the other defenders, except the mere fact, that they went to the meeting, which mere fact appears to be a fact that was considered by your Lordships' former judgment, as not of itself sufficient to charge them personally. In the instance of Mr Russell, if that was his name, which I think it was, who went into the room to ask a friend how he did, because the clerk put him down, he cannot be considered liable to any contracts then entered into. The circumstance of a man going in once in a year to see an acquaintance, the mere evidence of these minutes, that he was there, and without any evidence that he did any thing else, cannot make him liable; if he had gone to a subsequent meeting, and had homologated or approved of the contracts made at former meetings, that

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would not alter the case as to the contracts made at former meetings, but the condescendences of those individuals do not carry the case further than I have stated.

"My Lords, the difficulty I have really is this, Whether you should now conclude the case, or remit it back to the Court of Session? Because I believe it was the intention of those noble and learned Lords to whom I have alluded, that this condescendence should be of a very different nature from what it is; that it should specify the *acts* and *deeds* in addition to the mere presence at meetings, out of which this right of contribution is claimed. No such thing has been done, and I do not think you can send this back from time to time, and from year to year, to give a second, a third, and a fourth opportunity of considering the case in condescendences. I hope you may be advised to affirm the several interlocutors according to the terms which I have stated, and there are several petitions, which must be noted specially in the terms of the order."

Accordingly, it was ordered and adjudged that the original and cross appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Sir Saml. Romilly, Henry Erskine.*

For the Respondents, *Wm. Adam, Robt. Forsyth.*

1816.

MAULE v. MAULE.

WM. MAULE, Esq. of Killumney, . . *Appellant;*

The Hon. WILLIAM RAMSAY MAULE, . *Respondent.*

House of Lords, 10th May 1816.

This case, which was remitted by the House of Lords for further consideration, with certain findings, is reported along with the second appeal, in 1819.

1816.

MAJENDIE v. CARRUTHERS, &C.

Mrs ANN MAJENDIE, formerly ROUTLEDGE, and her Husband, ... *Appellants;*

WM. THOMAS CARRUTHERS of Dormont, and JAS. CARRUTHERS, ... *Respondents.*

House of Lords 29th June 1816.

This case is reported along with the second appeal, which was taken in 1820.

ROBERT CRAIG, Merchant, Paisley, . . *Appellant;*

THOMAS HOWIE, Merchant in Dublin, and ALEX. MURDOCK, Writer in Ayr, his Attorney, ... *Respondents.*

House of Lords, 5th March 1817.

BILL—CONDITIONAL ACCEPTANCE—AGREEMENT—EXPENSE OF SUIT.—(1.) A party agreed to accept a bill on certain conditions. He paid one half of the bill according to the terms and conditions agreed on; but refused to pay the other half until the condition of delivery of the oats, for which the bill was granted, was complied with. Held him liable for the second half of the bill. Reversed in the House of Lords. (2.) At same time an agreement had been entered into by the parties to prosecute for delivery of the oats, against the official assignees of the sellers, who claimed right to them. The appellant (acceptor) after this suit had gone on, settled the matter of dispute with the assignees, without consent of the respondent. Held him liable in the costs (£272, 10s. 5d.) of the suit. In the House of Lords, held him liable only for the half of the costs incurred prior to the date of his letter intimating the settlement that had taken place.

John and Alexander Wilson, merchants in Limerick, were in the practice of supplying the appellant with grain and butter. Their practice was, when the goods were shipped, to transmit invoices and bills of lading, and to draw bills for the price, which the appellant accepted on receipt of the shipping vouchers.

On the 25th December 1802, and on the very eve of their bankruptcy, they drew a bill upon the appellant for £400, payable sixty-one days after sight, without transmitting previously to him the usual advice, that they had shipped goods for him to that extent.

The respondent, Thomas Howie, having acquired right to this bill, transmitted it to his agent in Ayr, by whom it was sent to Paisley to be accepted. On presentation for that purpose, the appellant refused to accept, as he had not received, as usual, any shipping vouchers for value, and had no funds of the drawers in his hands.

A few days thereafter, he was assured by John Wilson, who was their agent in Glasgow, that oats were shipped and vouchers on the way. He then offered to accept the bill,

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CRAIG v. HOWIE, &c.

provided a month's delay was given in the term of payment. But this was not accepted of.

Matters were in this situation when the appellant received notice that the Wilsons, the drawers of the bill, had stopped payment; and that the oats meant for him, were consigned to Messrs Muirhead and Son, Glasgow.

The appellant was even requested by the Wilsons not to accept the bill, and he retracted the offer he had made, which, it was admitted by all parties, he had a right to do.

The appellant was thereafter informed by the Wilsons that they had set apart for him another quantity of oats in their store, upon which he would be preferable to the other creditors, and they again urged him to accept the bill, assuring him of this preference. It was not easy to see how he could be preferable, but he yielded so far as to offer to accept the bill conditionally, namely, the one half of it payable in two months, and the other half when the oats in question should be received by him. The respondent accepted of this conditional acceptance, and took steps to recover the oats in name of the appellant, at their joint expense, by an arrangement between them.

The assignees under the bankruptcy, however, opposed this, and after some litigation, in which the respondent took an active part, in order to make the oats furthcoming to the appellant, these assignees were successful in making good their claim to the oats.

In the meantime the appellant had paid the first half of the bill, but he refused to pay the second half, the oats not having been delivered as agreed to.

In an action raised by the respondent against the appellant for this half of the bill, and also for £272, 10s. 5d., as the respondent's expense incurred by him in the prosecution of the right to the oats with the assignees.

In defence, it was stated that his acceptance was conditional, and that the second half of the bill was only to be paid on delivery of the oats. In answer, it was alleged that the appellant was to blame for the respondent being unable to deliver these oats. He had, without the knowledge of the pursuer, entered into transactions and correspondence with the assignees, such as prevented the recovery of the oats, and ensured a verdict in favour of the assignees. In particular, by his letter of 6th February 1804, in which he says, "As I "have got such offers through the channel of my agent, Mr "Robert Rodger, from the assignees of the Wilsons in

"Limerick, in the matter of dispute between them and me, "as I have thought proper to agree to, I therefore intimate "to you, as I make no further claim on them for the oats, or "their production, which, I suppose, is in your hands, that "you are not, on any account, to use my name further, in "your carrying on the process or defence against the assignees "of the Wilsons; but as you are out of £200, *that* I leave "you to make good to yourself the best way you can. Mr "Rodger of Limerick, in giving up my claim to said oats, "does it upon the express condition that my giving up said "claim, does not interfere or prevent your claim for obtaining "or holding said £200 sterling, but leaves them and you to "settle that business as you think proper."

In reply, the appellant admitted the letter, but denied the construction and the effect put upon it. No transaction had been made by him with the assignees. But the respondent was not deceived as to the import of the letter. He did not stay the proceedings. He did not withdraw his name from them. He went on in his endeavours to recover these oats; and the cause was ultimately decided against him, not in consequence of that letter, but upon the *merits*.

The Lord Ordinary pronounced this interlocutor: "Finds "that by the original transaction and correspondence betwixt "the parties, the defender had agreed to pay the bill for "£400, drawn upon him by John and Alexander Wilsons, his "agents at Limerick, provided a delay of one month as to "the term of payment was granted: Finds, that by subse- "quent letters of correspondence, in March and May 1803, "parties had agreed to divide the risk, and to pursue joint "measures at their joint expense for recovering the oats pur- "chased by Messrs Wilsons for the defender, and on account "of which the bill in question for £400 was drawn, and by "indorsation came into the pursuer's hands: Finds, that "after this arrangement, it was improper and unwarrantable "in the defender, without the permission or knowledge of the "pursuer, to make any transaction with the assignees of the "nature and to the effect specified in his letter of the 6th "February 1804; and, therefore, upon the whole circum- "stances of the case, finds the defender liable in the sums "pursued for, and decerns." Nov. 14, 1809.

On two several reclaiming petitions to the First Division of the Court, the Court refused and adhered. May 28, 1813. June 18, 1813.

Against these interlocutors the defender brought the present appeal to the House of Lords.

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Pleaded for the Appellant.—1. The appellant is not liable to pay the second half of the bill with interest (£216, 13s. 4d.) claimed in the first conclusion of the respondent's summons, because the appellant never received the oats as his property, which was the condition of his granting the bill; and because it was not owing to any fault on the part of the appellant that the oats were not ascertained to be his property. In withdrawing his name, which he had simply given to assist Mr Howie in recovering the oats, he did no more than was right and proper, in so far as he was concerned. In doing so, this did not affect the right of the respondent to proceed with the action to recover the oats. Besides, the verdict given in that cause was a verdict given a twelvemonth after the date of the appellant's letter, and not in consequence of the disclamation of the proceedings on his part, but a verdict given on the merits, after the fullest investigation and proof had been led.

2. Even though by the agreement of parties the right to the oats was to be prosecuted at their joint risk and expense, the appellant could only have been liable to one half of £272, 10s. 5d., claimed in the second conclusion of the libel.

Pleaded for the Respondent.—Whatever view may be taken of the appellant's conduct, it leads to the conclusion of the respondent's summons, namely, that he is liable in the amount remaining due on the bill of exchange, and in the costs of suit, loss and expenses incurred, in the proceedings instituted for recovery of the oats.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is hereby declared, That the respondent is entitled to be paid by the said appellant a moiety of the costs incurred in the proceedings against the assignees of John and Alexander Wilson, prior to the date of the appellant's letter to the respondent of 6th February 1804: And it is ordered, That the cause be remitted back to the Court of Session in Scotland, to settle the said costs and do further what shall be just in consequence of the said reversal and declaration: And it is further ordered and adjudged, that with this declaration and remit the defences of the appellant (defender in the Court below) be, and the same are hereby sustained,

and that the said defender be, and he is hereby assoilzied, save so far as relates to the moiety of the said costs.

For the Appellant, *Sir Saml. Romilly, David Douglas.*

For the Respondents, *John Leach, M. Nolan.*

NOTE.—Unreported in the Court of Session.

SILVESTER DOIG, Bookseller in Edinburgh, and JOHN PITCAIRN, Papermaker, there, *Appellants;*

PATRICK SANGSTER, Manufacturer, Perth, Trustee for Messrs Colin Mitchell and Co., late Booksellers there, and for their Creditors, ... *Respondent.*

House of Lords, 24th March 1817.

SALE—ARTICLES OF ROUP—CONDITIONS—WARRANDICE.—The dictionary called the "Encyclopœdia Perthensis," during its publication in parts, was sold by public roup, but no person offered at the sale. Sometime thereafter, the appellants gave an offer for the entire work, "as lately exposed for sale at Edinburgh," which was accepted of. Thereafter, the appellants declined to grant the bills for the price, on the ground that the sellers did not convey the published parts lying in the hands of the booksellers. Held that the articles of roup must govern the sale, and that in these articles nothing was mentioned about conveying the parts consigned in the hands of the booksellers; but that it was a purchase of "all and whole the copies "or parts, perfect or imperfect, remaining unsold, *conformably* "*to inventory;*" and the whole that was contained in the inventory, it was admitted had been delivered. Affirmed on appeal.

The dictionary called the "Encyclopædia Perthensis," was originally projected by James Morrison, Bookseller in Perth, whose representative became connected in partnership with Messrs Colin Mitchell and Co.

The work, on their stopping payment, was exposed by public auction, while its publication was going on, and in the course of being brought out in parts or numbers. The articles of roup were written out in these terms:—"All and "whole the right of property or copyright of the 'Encyclo-"'pædia Perthensis,' so far as the same is an original work, "and of the whole copperplates or engravings connected "with the said work, those of the maps excepted; together

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" with the whole copies, complete and incomplete, remaining " unsold, both of the first and second editions of the said " Encyclopædia, atlasses, detached maps, impressions of the " plates, with the coppers themselves, under the exceptions " above-mentioned, *conformably to inventory and list sub-* " *scribed by the exposer, as relative hereto, and held as repeated* " *brevitatis causa.*"

It was provided that, upon bills being granted for the price, a proper assignation to the property should be executed by the present proprietor, and delivered to the purchaser.

It appeared that, for some time prior to the sale, Mr Pitcairn, one of the appellants, had been appointed as one of a committee of the creditors, to give his assistance to the surviving partner in the publication of the work. He was a large creditor himself, and he had a practical knowledge and experience in such publications. He accordingly took an active management in the publication. When, therefore, it was exposed for sale by public roup, no one dreamt that Mr Pitcrairn had any eye after the purchase himself, but it was noticed, that instead of taking the usual measures for inducing the booksellers to bid, which was his obvious duty, in carrying out the management confided to his care, he proposed an adjournment of the sale, which measure was adopted accordingly. After the adjournment, he intimated to the surviving partner, that before any sale was effected, that Mr Thomson should let him know. Thomson, thereafter, got an offer from Messrs Vernon and Hood of London, of £2300 for the entire property, and according to his promise, he gave notice to Mr Pitcairn, whereupon he sent off to Perth, Mr Doig, to make a bargain as to the purchase, at same time sending a letter stating that " any bargain you " may make with him, will have my approbation, and I will " guarantee." It turned out that Doig had given a previous offer on his own account, of £2250. And on this occasion he tendered an offer as on his own account, " of £2450, for the " entire stock of the Encyclopædia Perthensis, as *lately* exposed " to sale at Edinburgh, to be settled for at twelve, eighteen, " and twenty-four months. The bills to be guaranteed by " Mr John Pitcairn of Edinburgh." Mr Thomson, as acting partner of Messrs Colin Mitchell and Co., accepted of the above terms " for the *entire stock of the Encyclopædia Perth-* " *ensis, as lately exposed by us for sale in Edinburgh,*" this acceptance was authorized by the committee of creditors.

The whole stock of the Encyclopædia, with maps, copper-

plates, &c., were delivered over, conform to inventory, along with a list of subscribers to the book, to Mr Doig.

Mr Doig, however, sometime afterwards, declined to grant the bills, on the ground, 1st, That the creditors could not give a proper right to the copyright, and for that purpose that the concurrence of the executors of Mr Morrison should be procured. 2d, That part of the stock had not been delivered; in particular, those numbers and parts, lying in the hands of several of the booksellers before the date of the sale, had not been delivered.

To this it was answered, 1st, That in the articles of roup, and in the missives of sale, nothing was said about copyright; but that, to satisfy the defenders in this respect, the pursuers (respondents) had got the necessary concurrence to these deeds, so as to elide all other objections in that respect; and, therefore, that the creditors were in full right to assign the work thereby sold. 2d, That the purchase was made with special reference to the articles of roup, and the appellants bought the property as lately exposed for sale in Edinburgh. In the articles of roup, a subscribed inventory and list of everything was specially referred to, and everything contained in that inventory, was handed over to Mr Doig.

The Lord Ordinary pronounced a special interlocutor, holding the defenders (appellants) bound to pay the price as agreed on, and *inter alia*, "Finds that the mutual missives Feb. 13, 1813.
"refer to the public sale, and that the articles of roup pre-
"pared for the sale, and the printed inventory therein re-
"ferred to, which the defenders founded on, when they
"insisted for a conveyance to the copyright, must govern
"the principles upon which the dispute betwixt parties falls
"to be determined; that the inventory and articles of roup
"contain no obligation upon the sellers to make effectual
"to the purchasers any part of the books which had been
"consigned for sale to the different booksellers, of which
"the purchasers received a list, along with the names of
"the subscribers to the book,"- &c.*

On representation, the Lord Ordinary adhered, and on June 24, 1813.
reclaiming petition to the Court, the Court adhered. Nov. 16, 1813.

* It appeared that the appellants had recovered many of these parts, or received value from the booksellers for them, excepting those in Fowler's hands, who claimed retention until his account was paid. There was no warrandice from the sellers to make the parts effectual.

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Against these interlocutors the defenders (appellants) brought the present appeal to the House of Lords.

Pleaded for the Appellants.—1. The sellers were bound to deliver the whole copies of the work in question sold by them, and the copies in the hands of the agents, made part of the property sold.

2. So far from there having been any abandonment on the part of the appellants, of their right to have delivery of these copies, as often as they failed to obtain delivery from the agents, upon the order of the sellers, they recurred to them in order to obtain delivery, and by these means they procured delivery of all the copies stated to be in the hands of the agents, excepting 1125, fifty of which are said to have been sent to Glasgow, but the sellers are unable to specify the person or persons to whom they were sent, and the remainder are in the hands of Fowler, who declined to deliver them until the sellers settled their account with him. But delivery may even now be obtained upon the terms stated by Fowler's assignees, with whom the respondent has entered into a correspondence for the purpose of obtaining delivery, and it rests with him to come to a settlement with Fowler's assignees, before such delivery can be obtained.

3. The appellants have always been ready and willing to settle with the respondent, on getting delivery of the work which they purchased. But it must be manifest to any one acquainted with the nature of such a work, that the want of an early part or volume (and all the missing parts are early ones), destroys all the subsequent ones. These last have been printed by the appellants at an enormous expense, amounting on the book to nearly £10,000 sterling, a great part of which will be as waste paper to them, without those early parts, which they equally bought with those which have been delivered to them.

4. The early parts thus wanting, are detained not from any cause which the respondent cannot remove, but by reason of debts contracted by his constituents. He is, therefore, bound by that warranty which, in the law language of Scotland, is termed "warrandice from fact and deed," to remove that obstacle. There is no case of sale to which this species of warranty does not apply, and it is impossible for the respondent to demand and enforce payment of the price, without delivering every part of the work of the purchase of which it was the consideration.

Pleaded for the Respondent.—1. The appellants not only

got delivery in September and October 1809, of more than the whole property purchased by them, but they also got delivery long before the present action was brought into Court, of a great number of parts of the Encyclopædia, beyond what were sold to them by authority of the creditors. The property exposed to sale in Edinburgh was "all and "whole the copies or parts of the said publication, perfect and "imperfect, remaining unsold *conformably to inventory*." The property purchased by the appellants, was not described in the missives of sale, otherwise than by reference to what was exposed to sale in Edinburgh, that is, to the inventory, the whole articles contained in which, it is admitted, have been delivered to the purchasers.

2. Mr Thomson had no power to transfer to the appellants more than was included in their purchase; and, therefore, the addition made by him to the invoice of the consigned parts, was unwarrantable. But, supposing that the appellants had been entitled to insist for delivery of those parts, it is admitted they have all been delivered to them, with the exception of the parts in the hands of Fowler, and it is the fault of the appellants themselves that those parts have not yet been delivered to them. They have been held by Fowler on their account, and at their risk, for some years past.

3. The whole facts and circumstances of this case demonstrate, that the appellants have not acted with good faith to the respondent, and to the creditors of Mitchell and Co., and that their various pleas have been stated with no other view than to enable them to withhold payment of the stipulated price as long as possible. They have conducted themselves most disingenuously in the course of this litigation, by numberless misrepresentations, and by constant attempts to perplex the question at issue, and thus to throw a degree of confusion and intricacy over a very simple case.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed; and that the appellants do pay £150 of costs to the respondent.

For the Appellants, *Sir Saml. Romilly, Wm. Wingfield.*

For the Respondent, *Geo. Cranstoun, Wm. Boswell.*

NOTE.—Unreported in the Court of Session.

1817.

BRODIE, &c. v. BRODIE.

ELIZABETH BRODIE, Widow of William Brodie, late farmer at Amisfield Mains, in the county of Haddington, deceased; HELEN, JANET, and ELIZABETH, his three youngest daughters; and the Reverend WALTER FISHER, Minister of Cranston, the husband of the said Helen; and GEORGE BANKS, Seedsman and Ironmonger in Haddington, the husband of the said Elizabeth; for their respective interests, . . . } *Appellants;*

JOHN BRODIE, Farmer at Chesterhall, afterwards at Belhaven, the eldest son of said William Brodie, deceased, . } *Respondent.*

House of Lords, 26th March 1817.

TRUST SETTLEMENT—RESIDUE—CONSTRUCTION OF CLAUSE.—A testator by a trust-disposition, after making several special provisions, divided the whole residue among his widow, sons, and daughters, in the proportions following:—"The division "to run thus, as nine to ten, that is to say, for every ten "pounds that shall fall to the share of *each* of my sons, my "spouse, and three youngest daughters, shall be nine." The question arose upon this clause, Whether for every £10 that each of the sons took, the daughters were to draw £9 *each*, or only £9 among them as a class. The Court of Session held, that while the sons took £10 each, the widow and daughters were only entitled to £9 among them in a class. Reversed in the House of Lords, and held them entitled to £9 each, for every £10 drawn by each of the sons, according to the true construction of the trust-disposition.

The late William Brodie, farmer at Amisfield Mains, left a trust deed and settlement for the following purposes:—1st, For the payment of his debts. 2d, For the payment of an annuity of £300 to his widow, which was "ordained to "be paid from off the farm of Upper Keith, as long as "the present lease shall last. 3d, The tack of Upper Keith, "I have assigned over to my daughter Agnes and her hus-"band, and her heirs, they being bound to pay me, and my "heirs, an annuity of £600, during the lease yet to run," &c., "which annuity, after my death, shall be distributed "in the following manner, to my spouse, as already men-

"tioned, £300 yearly; the other £300 to be divided among "my family, as follows, £100 to Agnes," &c., "the two "remaining hundreds to be divided among the five others "of my family, viz., my two youngest sons, Alexander and "George, and three youngest daughters Helen, Janet, and "Bess. 4th, The farm of Amisfield Mains I leave to my "son Alexander, in case he chooses to accept of it, with "£3000 for stocking the same," &c. "But in case my son "Alexander should not choose this farm, or it should be "otherwise disposed of, and not given his discharge for his "bairns' part of gear, then the forenamed trustees shall pay "him a portion of £2500 sterling, and then come in jointly "and equal with his brothers."

Then follows this clause, that "As my eldest son John, "and my youngest son George, with my two eldest daughters "Agnes and Helen, and my youngest daughter Bess, is "already provided for, and given me their discharge for their "bairns part of gear, they shall come in for no part of "legacy until my son Alexander shall be paid his portion "of £2500 sterling, and my daughter Janet's portion of "£1200 sterling, unless they have got their portion in my "*lifetime*, and given their discharge. 7th, Besides the an-"nuity formerly mentioned to my spouse, she shall come in "for her part of legacy equal to one of her youngest "daughters, with all the table linen and napery, which shall "be entirely at her own disposal; likewise my spouse shall "have the use of the household furniture and silver plate as "long as she lives."

Then followed the clause which gave rise to the present dispute, "I hereby empower my foresaid trustees, tutors, "curators, factors, executors, to divide the *remainder* of all "money, whether in heritable bonds, or otherwise, goods or "effects, among my spouse and children afternamed, viz., "my three sons John, Alexander, and George, and my "three youngest daughters, Helen, Janet, and Bess; *the* "*division to run thus, as nine to ten;* that is to say, for *every* "*ten pounds that shall fall to the share of each of my sons,* "*my spouse and three youngest daughters shall be nine.* Be "it further understood, that after the death of my spouse, "her annuity shall be divided in the same proportion among "my six youngest children, or their heirs."

Mr Brodie, having sometime afterwards taken the farm of Burney Mains, he added a codicil to his trust deed, on 12th December 1809, declaring his son Alexander might take it,

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or Amisfield Mains, declaring that the farm rejected by Alexander should go to the eldest brother John.

He died a short time after the execution of this codicil.

After his death, it appeared, that the whole of Mr Brodie's children, with the exception of Alexander and Janet, had received certain provisions from their father, and had granted discharges and renunciations of their legal claims.

A multiplepoinding having been brought by the trustees, two points were made in the dispute between his surviving children:—1st, Whether the clause directing the division of the *residuary fund* established a proportion of ten to nine between the sons *individually*, and the widow and daughters *individually*; or between the sons, *individually*, and the widow and daughters *as a class*; and 2d, Whether or not Alexander, by accepting the farm of Amisfield Mains, was excluded from any share in the residuary fund?

May 14, 1811. The Lord Ordinary (Newton), of this date, pronounced this interlocutor: "The Lord Ordinary having considered "the foregoing claim for John Brodie, eldest son of Mr "William Brodie, tenant in Amisfield Mains, with counter "claim for Mrs Elizabeth Bogue, widow of the said William "Brodie, and for her younger children, containing answers "to the claim for John Brodie, replies for John Brodie, and "duplies for Mrs Elizabeth Bogue and her younger children; "and having also particularly considered the trust-disposi- "tion and settlement, executed by the said William Brodie, "finds that the residuary bequest of his funds and effects, "can bear no other construction than that which he himself "has put upon it in the said clause of his trust-disposition, "viz., 'that it shall be divided among his spouse and chil- "'dren therein named, to wit, his three sons John, Alexander, "'and George, and his three youngest daughters, Helen, "'Janet, and Bess. The division to run thus, as nine to ten; "'that is to say, for every ten pounds that shall fall to the "'share of each of my sons, my spouse, and three daughters, "'shall be nine.' Or in other words, that the spouse and "three daughters shall only draw amongst them £9 for every "£10 that each of the sons shall draw. And that, though "the expression of the *division running as nine to ten* may "not be strictly accurate, yet, as the testator has himself "expressly declared, what he thereby meant, no other con- "struction of it can be admitted; but finds, that Alexander, "one of the sons, having betaken himself to the farm of "Amisfield Mains, and £3000 for stocking the same, which

"are specially settled upon him by the trust-settlement, he "cannot both claim these and a share of the residuary funds: "Ordains the trustees, the raisers of the multiplepoinding, to "give in a scheme of division of the trust funds, in terms "of Wm. Brodie's will, and of this interlocutor; and when "given in, allows all concerned to see the same, and object "thereto if they shall see cause." On representation, Lord Gillies adhered.

Various questions having been submitted to the Second Division of the Court in a reclaiming petition, which was followed by answers, the follow interlocutor was pronounced: "The Lords having resumed consideration of this petition, May 27, 1812. "and advised the same, with answers thereto, adhere to the "interlocutor complained of, in so far as it finds, that Alex- "ander Brodie, having betaken himself to the farm of Amis- "field Mains, and £3000 for stocking the same, cannot both "claim these and a share of the residuary fund;* and refuse "the desire of petition, in so far as it prays for an alteration "of that part of the interlocutor: Find that the petitioner "(John Brodie), is not barred by the deed of ratification "from insisting in his present plea; but before deciding what "is the just construction of the clause in the settlement "directing the distribution of the residuary fund, appoint "the parties to put in mutual memorials on that branch of "the cause."

These memorials having been given in, the Lords pronounced this interlocutor: "Having resumed consideration May 12, 1813. "of this petition, so far as regards the just construction of "the clause in the settlement, directing the distribution of "the residuary funds, and having advised the same, with the "answers thereto, and mutual memorials for the parties; "refuse the prayer of the petition, and adhere to the inter- "locutor of the Lord Ordinary complained of, with this "explanation, that in the distribution of the residuary funds, "the sons shall draw £10 sterling each, for every £9 drawn "by the widow and daughters among them, *as a class*."

On reclaiming petition, the Court adhered. Feb. 1, 1814.

Against these interlocutors the present appeal was brought by the appellants to the House of Lords.

Pleaded for the Appellants.—1st, The clause in dispute was framed by the testator for the express purpose of regulating the distribution of the residue *among* his wife and family, of that

* This part of the interlocutor was acquiesced in.

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portion of his effects which remained after the specific appropriation of certain sums of money, or particular subjects contained in the preceding part of the deed; the testator must be presumed, therefore, to have had an individual distribution in view, and the declaration, that the division shall run as nine to ten, with its accompanying explanation, implies, that the individual distribution was to take place according to that proportion, and that the share of the wife and daughters individually, was to bear a *ratio* as nine to ten, to that of the sons taken individually. The clause is, no doubt, very loosely expressed, in which respect, it only resembles the other parts of the deed, which are equally loose in expression. But it seems utterly inadmissible to canvass the meaning of such a settlement by the strict rules of grammar. The respondent says, that the expression, "my "spouse and three daughters shall be nine," thus uniting the spouse and three daughters into a class, is not only unambiguous, but is technically descriptive of a conjunct legacy as opposed to an *individual bequest* by the Roman law, which in this particular is identified with the law of Scotland; but the various authorities appealed to by the respondent, do not bear any legal application to the present case, and do not lend even any light in clearing up the dispute, in so far as the language here used is concerned. The question between the parties is, no doubt, Whether the proportion of £9 is a disjunct proportion to be paid to each individual, or conjunct proportion to be paid to them as a body; and the respondent has certainly produced high authority for maintaining, that an individual or collective appropriation was uniformly implied by certain forms of expression in the Roman law. It is clear, however, that these expressions are either of such a nature as to exclude the possibility of any other interpretation, or, that they are technical terms, consecrated by the Roman law to that particular purpose, totally inapplicable to the practice of our law, and almost untranslatable into our language. Under the first of these clauses may be included the various expressions, "*Titio et Mœvio ædes do, lego;*" "*Titio et Mœvio fun-*" "*dum Cornelianum do, lego,*" which the respondent has proved, by various authorities, to mean conjunct legacies. It must be perfectly evident, that the disjunctive interpretation is there completely excluded by the subject of the legacy; and that, if only one house, or one farm was actually bequeathed, the legatees could not have each a house or a farm to himself. The same remark may apply to the quotation from Stair, "Where the proportion is express equal or

Stair, lib. iii., tit. viii.

"unequal; thus, let *Titius* or *Mœvius* be my heirs equally, "or let *Titius* be heir in one-half, and Mœvius and Caius in "another half; here Caius and Mœvius are conjunct in "words and matter; but they are several from Titius, both "as to words and matter." It certainly requires no quotations from commentators here to decide that *Mœvius* and Caius can only get a conjunct legacy, for the obvious arithmetical reason, that if Titius received one-half, there would remain but one other half to be divided.

But the question here regards the sense of a particular form of expression used by a testator; and it seems sufficiently obvious, that in such a discussion no assistance can be derived from the technical import of certain expressions in another language, differing completely in its idiom from that in which the testament is framed.

2. It is assumed by the respondent, that when a number or plurality of persons are appointed to receive a proportion, that proportion must necessarily be understood to be divisible *amongst them*, and not to be *exigible by each;* but the appellants conceive, that this assumption, taken as a general rule, is utterly erroneous, and that a number of persons, whether connected by copulatives, or expressed by a plural number, do not always imply a class connected collectively, with the verb to which they stand as nominatives; but must, in various cases, be construed individually as a series of substantives in the singular number. Whether this be warranted by the strict rules of grammar, or imply an ellipsis of the word "each," or some such mark of individuality, it is unnecessary to inquire. It is sufficient, that such a construction is received in ordinary language, without giving rise in general to any doubts of the meaning, which it is the intention of the persons using it to convey.

Besides, by the deed itself indications the most positive and express are set forth to show that this was an individual distribution among his whole six children, for after the clause in dispute he proceeds to say, "Be it further understood, that "after the death of my spouse, her annuity shall be divided "in the same proportion *among* my six youngest children, or "their heirs." These words express an individual distribution among the six children, and not to the daughters only as a class. By another clause in the deed, he allows £100 sterling a year to be retained by Agnes and her husband; and that £100 "shall be *their* full part of legacy, as I con- "sider they have got a good bargain of the farm of Upper

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"Keith," expressions which, if there be any meaning in language, show that there was a very considerable difference between the value of that annuity and the portion of legacy which he understood would be drawn by her sisters.

Pleaded for the Respondents.—1. Alexander Brodie, after having declared his option to take the lease of Amisfield, with £3000 for stocking the same, has no claim to any share of the residuary fund, by the true meaning and expression of the trust-deed in question. He had not got his provision, like the others, from his father; and the option given to him was, either to take the farm and £3000, in lieu of every thing he could claim by the deed, or giving up the lease and the £3000, to take £2500 as his share of the residue. 2. The clause in the settlement as to the residue, by which the deceased, after the adjustment of all the special provisions, divides the whole among his spouse, his sons, and his three younger daughters, is in these terms: "The division to run "thus, as *nine* to *ten;* that is to say, For every *ten* pounds "that shall fall to the share of *each* of my sons, my spouse "*and* three youngest daughters shall be nine"—does, according to the natural, the grammatical, and the legal meaning of the words so employed, import that *each* of the sons shall draw a share of the said residuary fund, bearing the same proportion to a single share, to be drawn by the *widow and three younger daughters among them, as a class of joint legatees,* which the sum of *ten pounds* bears to the sum of *nine pounds.* And the testator having declared, in express words, that this is his meaning, no other construction is admissible. Had he meant that the "spouse and three younger daughters," should take individually, and not as a class, he would have used the term "each" as applicable to them, in the same manner as he has used that word when describing the sons. 3. If the clause is construed according to the natural and legal meaning of the words, the whole settlement is rational and consistent, and accords with a systematic plan, by which the testator proposed to divide his estate among his children. But if the construction proposed by the appellants were admitted, the settlement would be rendered completely irrational and absurd, reconcileable to no plan or principle whatever, and inconsistent with all the acknowledged views of the testator.

After hearing counsel,

The LORD CHANCELLOR said,

"My Lords,*

"This is an appeal, first, from an interlocutor of Lord Newton, Ordinary, of whom (as he is no more) it is not indelicate now to say, that his authority was very considerable. It regards the meaning of a clause in a trust-deed which I shall consider more at large by and bye. In the case below, Lord Newton pronounced, first, this interlocutor." (Here his Lordship read Lord Newton's first interlocutor.) "The principle here laid down by Lord Newton I admit to be unquestionable, that, when a testator himself expressly declares what his meaning is, *no other construction* can be admitted; but this still leaves behind what this meaning truly is.

"I observe, that Lord Newton's construction of the clause, was, that "the spouse and three daughters should only draw amongst "them £9 for every £10 that each of the sons should draw," which I understand to mean, that if the three sons took £30, then the spouse and three daughters would be entitled to £27 among them.

"The interlocutor, in so far as it respects Alexander's special provision, has been subsequently acquiesced in."

(His Lordship next read the interlocutors of Lord Gillies, and of the Second Division appealed from.)

"I observe, that the interlocutor of the Second Division of the 12th of May 1813, adheres to the interlocutor of the Lord Ordinary, with this explanation, that, in the distribution of the residuary funds, the sons shall draw £10 each, for every £9 drawn by the widow and daughters among them, as a class.

"If I understand this aright, though both the Lord Ordinary and the Court were agreed in the principle which ought to rule this case, yet they came to this very different conclusion, that, whereas the Lord Ordinary was of opinion that the property was to be divided as £30 is to £27, yet the Court was of opinion, that while the sons took £10 each, as individuals, the widow and three daughters come to take £9 among them, as a class.

"It is impossible for any one to show the obscurity of the clause more strongly than is done, by two Courts having come to two opinions upon it, so totally different. It is a fair question, therefore, if a third Court may not find a third meaning for the clause, as clear as the other two.

"In the printed papers, we have a good deal of acute reasoning on the advancements of money given to the different children during the father's life, and on the terms of the will of the testator's father. Even if we had this last before us, we could not look into it, unless Mr Brodie had himself referred to it in his

* Taken by Mr Robertson.

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will. Neither could we take notice of the advancements of money to children, unless he had himself referred to this in his will.

"I conceive there can be no doubt that in the interpretation of an instrument like this, we are entitled to look at the whole will, when we have to inquire into the meaning of any part of it. My noble and learned friend (Lord Redesdale) may remember a case of this kind, in the English courts, where a testator had devised part of his real estate to A, without a word of limitation, but these were supplied from another part of the will, where he said he meant to give a similar estate in Black to A that he had given in White to B.

"In looking at this will, I find inaccuracies in many parts of it, all of them requiring construction."

(Here his Lordship read the trust-deed from the beginning, commenting upon the different clauses as he proceeded.)

"I observe that, in the commencement, he refers to his 'own 'will and instructions,' not to the will and instructions of any body else.

"In the clause disposing of the 2d £300 surplus rent from the farm of Upper Keith, the words '*my family*,' appear to be exclusive of his spouse, whereas, in other parts of the instrument, they may bear a different construction.

"The £100 a year to be retained by Agnes and her husband, as '*their full part of legacy*,' we understand from other parts of the instrument, must mean *their share of the residuary fund.* When he says, he considers that Agnes and her husband have got a good bargain of the farm of Upper Keith, even if this were doubtful, it would not let in Agnes to her share of the residue.

"When he says, 'The two remaining hundreds to be divided 'among the five others of my family, namely, my two youngest 'sons, Alexander and George, and my three youngest daughters, 'Helen, Janet, and Bess;' this clearly means, a division among them as individuals; yet there are two classes, and if we were to take the civil law authorities, without looking at intention, we should divide these hundreds between the two classes, as two to three.

In the disposition of Amisfield Mains too, you cannot go on the strict words of the instrument. Nobody can doubt that his meaning was, not to give to Alexander both Amisfield Mains and a share in the residue. When he says as to the latter alternative, 'then the foresaid trustees shall pay him a portion of '£2500, and then come in jointly and equal with his brothers,' he must have meant, that Alexander should so come in, jointly and equally with his brothers, not that the trustees should do so, though the words import this.

"Again, where he says, that Mrs Fisher's provision shall, in a certain event, return to *this family*, this may occasion a question,

what individuals he meant. When he says also, that Mrs Fisher, in another event, is to come in for no part of legacy, this must mean, a share of the residue.

"When he mentions, that his eldest son, and others of his children, were already provided for, and should come in for no part of legacy till Alexander should be paid his portion of £2500, and his *daughter Janet's* portion of £1200, it never could be contended that any inequality in their provisions could have any effect as to the residue; the other part of the clause also requires *construction*, for he could never mean that Alexander was to take both the £2500 and his sister Janet's £1200, yet so the words import.

"As to the clause itself, it was contended, that certain constructions of it tended to absurdity. I would agree that no absurdity in the principle of division ought to prevail against the meaning of clear words, yet in a doubtful case, and where the words are obscure and interpretation necessary, this absurdity of principle is one way of getting at the meaning of the words.

"If he had stopped at Bess, it might have been contended that there were three classes, his spouse *one*, his sons a *second*, and his daughters a *third*.

"In any view, Lord Newton's interpretation of the clause, is much more according to the strict words, than the interpretation of the Court. According to the former, while the sons as individuals would take £30 amongst them, the spouse and daughters would get £27 as a class. If the strict words are to be taken thus, how is it possible to construe them, by intention, to mean that, if the sons took £30, the mother and three daughters were to take £9 among them.

"I allow that in either way, the distribution might have varied by the deaths of the sons and females. But he further says, that after the death of his spouse, her annuity shall be divided in the *same proportion*, among his six youngest children, or their heirs. This clearly showed that he had an individual division in his view, as after the death of his wife, his daughters must necessarily have taken a different division, from what, in the other cases, they would do, of the residue of his estate.

"Upon the whole, I think the meaning clearly is, that while *each* of his sons was to take £10, *each* of his wife and daughters was to take £9. If he had said, my three sons shall take £30, and my spouse and three daughters shall take £9, then, I conceive, the words of the will would have bound us; but the words are very different here, and I think the meaning I put upon the clause, is the most rational, when all parts of the will are taken into view.

"But in declaring this to be the meaning of the will, we must be careful not to prejudice the contingent rights of any parties,

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as to what may occur relative to the provisions to Mrs Fisher; this I mean to provide for in the words of the judgment."

LORD REDESDALE.—"It appears to me that the decision in this case is not only erroneous, but that the grounds of it are also erroneous.

"The Court seems to have excluded from the construction of the clause everything but the words of the clause itself, whereas, they ought to have looked at the whole instrument.

"When the Lord Ordinary, in the first instance, thinks that the word 'and' makes the daughters a class, why it should have this effect here, and in no other part of the instrument, I am unable to discover. If it did make a class, the judgment of the Lord Ordinary was right; the sons, if three, would share in the residue, and would thus take £30 for £27, that the females would take. But when the testator directs his trustees to *divide* the residue among his spouse and children, after named, he indicated an individual distribution.

"If he had stopped before the words, 'as nine to ten,' there would, according to the judgment, have been three classes, 1st, The wife,—2d, the sons,—and 3d, the daughters.

"These words, 'as nine to ten,' are very important, whether we adopt the view of the Lord Ordinary or of the Court. We must advert to the view of this which existed in the testator's mind.

"To exclude Alexander from a share of the residue, the Court must go against the strict words of the clause. But the testator evidently meant that Alexander should only take a share in the residue, if he did not take his special legacy.

"According to the Second Division of the Court, if all the three sons were to take, there would be a division as of £30 to £9; if only two, they would take as £20 to £9; and if only one, he would take £10 to £9; but he previously announces his purpose to make an individual division, then he says, as nine to ten; but these words are merely explanatory; his meaning in my view clearly was, that each of his sons should take £10 for every £9 that each of the females should take.

"It is perfectly clear to me, that neither the Lord Ordinary nor the Court has given the true meaning and intention of the testator. Even in this clause, I see nothing to make the daughters a class; but when you look at the whole will, this is quite clear that the strictest interpretation of the words would only give the interpretation of the Lord Ordinary. Upon the whole, therefore, I entirely concur in the judgment that has been proposed.

Journals of the House of Lords.

It was, therefore, ordered and adjudged that the several interlocutors complained of be, and the same are hereby reversed, so far as the same regard the construction of

the residuary clause in the said trust-disposition of the said William Brodie deceased, with respect to the division to be made of the residuary funds and effects of the said William Brodie, amongst his widow, his two sons, John and George, and his three daughters, Helen, Janet, and Bess, his son Alexander being excluded from a share of such residuary effects, as in the said interlocutors expressed: And find that, according to the true construction of such trust-disposition, such residuary funds and effects (subject to the question after mentioned), ought to be divided between the said widow and the said sons, John and George, and the said daughters, Helen, Janet, and Bess, in proportions following, that is to say, that, for every £10 of such residuary funds and effects which shall be drawn by each of the said sons, John and George, upon distribution of such funds and effects, the widow shall draw £9, and each of the said daughters, Helen, Janet and Bess, shall draw £9, so that when the sons shall take £10 each, the widow and daughters shall take £9 each. But this finding is to be subject, nevertheless, as to the share of the said daughter, Helen, to any question which may arise touching such share upon the true construction of such trust-disposition, with regard to the conditions expressed therein concerning the said Helen, and her husband, the appellant, Walter Fisher. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session, to do therein as shall be just.

For the Appellants, *Sir Saml. Romilly, John Fullerton.*

For the Respondents, *John Leach, John Clerk, James Moncreiff, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

WM. WALKER, Esq. of Coats, . . . *Appellant;*

Major JAS. WEIR of Tolcross, . . . *Respondent.*

House of Lords, 26th March 1817.

ROAD—POWER OF TRUSTEES IN SHUTTING UP ROAD—ACQUIESCENCE.—Three questions occurred in this case, 1st, Whether there was any power in the road trustees to shut up a road at Bell's Mills? 2d, Whether, supposing they had such power,

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this had been duly exercised? 3d, Whether, if this was not duly exercised, there had been any such acquiescence or homologation on the part of the appellant, as to prevent him from challenging the transaction between the road trustees and the respondent in regard to the road. Held in the House of Lords (altering the judgment of the Court of Session), that the road had not been shut up by any competent authority, and that the soil was not legally vested in the respondent. *Quoad ultra* the case remitted to review the interlocutors, regard being had to these findings.

The question at issue in this case regarded a road leading to Bell's Mills, Water of Leith, of which the appellant stated he had been deprived, but which the respondent alleged had been shut up and disposed of to him, some thirty years before the raising of the action.

The appellant's property at Drumseugh was purchased in 1801, from Lord Colville, and consisted of *two* enclosures, both of which are described to *be bounded* on the north by the highroad leading from Edinburgh to Bell's Mills on the Water of Leith; and to both there was a separate entry or access from the road.

Prior to 1785, the chief road from Edinburgh to Queensferry passed through Kirkbraehead, by the back of the Earl of Moray's house, and from thence, down to the Water of Leith Mills, by the bridge there.

Another public road struck off from this, nearly at the back of the Earl of Moray's house, and diverging in a direction almost north-west, passed along by the house of Drumseugh, then the property of Lord Colville, and leading nearly straight downwards to Sunbury, and to Bell's Mills, and the ford upon the Water of Leith.

The road called Bell's Mills Road, was the road in dispute, and, in the appellant's charter, was bounded by his premises on the north. He contended, that it was as much a public road as the other; and the one was called the *road to the Water of Leith*, the other, the *road to Bell's Mills*.

The property which lay betwixt these two highways, with the exception of the angle where they diverged, belonged partly to Mr John Mackenzie and Major Weir jointly, and partly to Major Weir individually.

As the road by the Water of Leith was rather steep and inconvenient, the trustees upon the highways for this district, sometime prior to 1785, thought it advisable to make an alteration upon it. A new bridge was built at Bell's Mills;

and the road, instead of going through the ford, at the bottom of that village, was conducted in a sloping direction, and by an easy access to Bell's Mills Bridge, and so onward till it joined the former road to Queensferry.

By this improvement, it was stated, that the public travelling from Edinburgh by Kirkbraehead to Queensferry, or to Bell's Mills, gained a more commodious access to these places. But it did not follow, that any other road, in which individuals were interested, and by which they had access to their properties, in virtue of their charters, should thereby be superseded and shut up. This, more especially, applied to the highway by Bell's Mills, the road in dispute. The only access to Lord Colville's house and property at Drumseugh, both to the south-east, and to the north-west, was by this road; the new line by Queensferry touched no part of these premises, except at the bottom, where, from its being so much lower than the ground, it could be of no use; and everywhere else, the premises of Mr Mackenzie and Major Weir were situated between these two roads.

In 1801, the appellant purchased Lord Colville's property, as above-mentioned. Previous to doing so, he made careful examination into the state of these roads, examined the public records, and the title-deeds; and in order that he might know the state of the conterminous property belonging to Mr Mackenzie and Major Weir, the records as to these were examined, and the whole completely satisfied him, that there was free access to the *Bell's Mills Road*, all along the north side of Lord Colville's property; and that it was absolutely bounded on that side by a public highway in daily use.

The appellant's subjects were described as follows:—"All "and whole, that lodging or dwelling-house, garden, and "park, with the haill office-houses, parts, pendicles, and per- "tinents of the same, lying near Drumseugh, within the "Barony of Broughton, Parish of St Cuthberts, and Sheriff- "dom of Edinburgh; as also, all and whole, a stable and "hay-loft above the same, *having an entry by the highway*, "leading to the said dwelling-house, together with a stripe "of ground, and trees growing thereon, lying between the "south hedge of the above garden, and the park dyke to the "south thereof; part of the quarry park, as the same were "then possessed by James Keir, Esq., Bughtrigg; the "measure of the ground of which whole premises, *including* "*the thickness of the dykes and hedges of the said* park and "garden, the sweep at the coach-house, and the *great door of*

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" *the park*, extends to 3 acres, 2 roods, 34 falls, and 17 ells, " and bounded as follows :—On the east by the Quarry " Park, sometime belonging to Adam Keir, baker in Edin- " burgh ; *on the north by the highroad, leading from the turn-* " *pike road to Bell's Mills ;* and on the west and south parts, " partly by these 2 acres, 2 roods, and 30 falls of ground, " being part of the lands of Coats, and formerly set in tack " to James Finlay of Wallyford, *in manner after mentioned*, " and partly by that angle of ground disponed to the said " James Keir by Alexander Cunningham."

The other subject referred to above, is thus described and conveyed :—" Also, all and whole the 2 acres, 2 roods, " and 30 falls of ground, being part of the lands of Coats, set " in tack to James Finlay of Wallyford, and bounded as fol- " lows :—on the east by the foresaid lands acquired by the " said James Keir from William and Adam Keir ; and on the " north, west, and south, partly by the foresaid highroad, and " partly by the lands of Coats, belonging to the said Alex- " ander Cunningham, together with the teinds," &c.

From the examination of the public records, it appeared, that the property upon the opposite side of the highway to Bell's Mills, belonging to Mr Mackenzie and Major Weir, was described in their title-deeds as, " all *enclosed by a stone* " *dyke or wall*, bounded as follows, viz., by the dwelling-houses " and garden dyke, possessed by the said Thomas Allan him- " self, on the south and south-east ; the highroad leading from " Edinburgh to Bell's Mills, on the south and south-west " (the road in dispute) ; and the highroad from Edinburgh, " leading to the Water of Leith Mills, on the west, north, " and north-east parts, consisting in whole, the subjects hereby " disponed, of three acres or thereby."

Major Weir had acquired right to Mr Mackenzie's interest in the subject so interjected betwixt the two roads ; and relying, it seems, upon certain latent and private proceedings, which had taken place about or since the year 1785, betwixt an individual, who happened to be one of the trustees upon the highways, and Mr Mackenzie ; he, sometime after the appellant's purchase in 1801, proceeded to make encroachments upon the road in dispute, as if he had been proprietor of it. In particular, he took down his own wall, by which his ground was described, in his title-deeds, as enclosed, and in working a stone quarry upon his own property, not far distant from this road, he so far encroached upon it, that a part of the road, and the wall which enclosed the appellant's

property, were thrown down. He also laid some stones across the lower end of this road, so as to interrupt the passage of carts. This being removed, he afterwards put up a bar gate, at the upper end of the road, close to the appellant's stable, with a view to appropriate the road beyond it to himself.

An application was then made to the Sheriff by the appellant, praying him, that the road in question ought to be left open for his and the respondent's use; that the wall was his absolute property; that Major Weir had no right to fill up the road between their properties, more especially, to lay earth and rubbish against the appellant's wall; and to prohibit and discharge him from doing so.

In answer to this petition, Major Weir, founded on the agreement which his author had with George Loch, Esq., convener of the committee of the Cramond Road Trustees, which set forth, "1st, Mr Mackenzie for himself and his own "interest, agreed, that the trustees shall take from his property "at Drumseugh, the ground pointed out by them for widening "the road, beginning at the bank near the red door, on the "road leading to the Dean, and running from the said bank "to the north-west end of his property, and that the trustees "shall have immediate access to the said ground. Dated Oct. 14, 1786.

"2d, That the price to be paid for said ground to Mr "Mackenzie and Mr Weir, shall be at the rate of £250 "sterling per Scots acre, which is to include the value of the "fruit trees on the said ground, which Mr Loch agrees shall "be paid at Martinmas first; and besides the said price, the "old road shall belong to the joint property of Messrs Mac-"kenzie and Weir, so far as it is adjacent, say the old road "lying betwixt said property and Lady Colville's property, "leaving out free all the said road lying to the north of the "corner of Lady Colville's stable. The trustees are to "enclose, on their own expense, the joint property of Messrs "Mackenzie and Weir, with a wall built of stone and lime, "equal in height with what of the new wall is already "finished.

(Signed) "GEORGE LOCH.
" "JOHN MACKENZIE."

Upon production of this agreement, the sheriff pronounced this interlocutor: "Finds, that the defender (respondent) "by this transaction with the trustees for the highroads, in "1785, acquired right to the area of the old road, and the July 1, 1807.

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"same has been occupied by him exclusively since; there-
"fore dismisses the petition and decerns"

An advocation was brought of this judgment to the Court of Session by the appellant, and he also brought an action of declarator to have his right declared and established, and the encroachments put an end to. These two actions having been conjoined, the Lord Ordinary pronounced this interlocutor: "Sustain the defences in both processes, assoilzies "the defender (respondent), and decerns; but, in respect, "the pursuer is a singular successor in the lands, and that "the defender did not produce the documents, on which he "rested his plea, until they were called for by the Lord "Ordinary: Finds no expenses due." On representation, his Lordship adhered. And on two several reclaiming petitions to the Second Division of the Court, their Lordships adhered.

Nov. 14, 1809.

Jan. 10, 1810.

June 22, 1810.

July 10, 1810.

Against these interlocutors, the present appeal was brought by the pursuer to the House of Lords.

Pleaded for the Appellant.—1st, The appellant purchased his property in 1801, from Lord Colville, upon the faith, and after due examination of the public records; and from these it appeared, that the road in dispute was a public highway.

By the title-deeds of his property, standing upon record, it was ascertained, that the first portion of it was bounded "*on the north by the highroad* leading from the turnpike "road to Bell's Mills." The second portion, consisting of 2 acres, 2 roods, and 30 falls, was bounded "on the north-"west and south, *partly by the foresaid highroad.*" And when the restriction in favour of the pleasure walk is mentioned, the road in dispute is again noticed; namely, "for "the space of 32 feet, all the way from the end thereof, to "the road leading to Bell's Mills."

These gave to the appellant a clear right to the road. But the titles of the respondent are equally explicit. They are described, as *all enclosed with a stone dyke or wall*, bounded by "*the highroad leading from Edinburgh to Bell's Mills on* "*the south and south-west.*"

2d. The step, or secret transaction entered into in 1785, betwixt Mr Loch and Mr Mackenzie, cannot be set up to contradict, or alter, the rights of parties. Mr Loch was never empowered to enter into this agreement by the other trustees, and he could not legally enter into it alone. There was not the slightest evidence adduced that he had been so authorized. The respondent was repeatedly called on to

show Mr Loch's authority, but he could produce none; and it must, consequently, be held that Mr Loch took the matter entirely upon himself, and had no authority from any one. Even the sanction of the trustees themselves would have been no authority to Mr Loch to proceed in a transaction, the object of which was to deprive both the public and a private individual of his property, unconsenting thereto. It is a servitude for the public that the trustees hold, while the feudal title and right to the minerals is vested in the conterminous heritors, whose right to the surface has been taken from them for a public purpose; and when that purpose ceases, it is *ultra vires* of the trustees to do any act by which a preference, as in this case, is given to one adjoining proprietor over another. The authority, therefore, of the trustees could not have mended the matter. But when it is found that, even if they had such authority, they did not delegate it to Mr Loch, the measure was still more destitute of legal authority.

Pleaded for the Respondent.—The road in question was condemned and shut up by the Trustees for the Public Roads in the year 1785, and was then transferred by the authority of the same trustees to the respondent and Mr Mackenzie, and annexed to their property, in exchange *pro tanto* of the ground given by them for making the new road to Queensferry by Bell's Mills. And the transaction being of a public nature, and entered into for the benefit of the public, who have acquiesced therein ever since the year 1785, the powers of the trustees to shut up and transfer the road cannot now be questioned. And, in particular, the appellant is not entitled to question the same, as he only claims the use of this road in right of the property of Drumseugh, which he purchased from Lord Colville, by whom the powers of the trustees were directly acknowledged, and who also acquiesced in the respondent's possession and enjoyment of the said road, under circumstances amounting to a confirmation of the respondent's title thereto, and a waver of all right which the said Lord Colville, or any subsequent proprietor of the appellant's property could have, or pretend to the said road.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,*

"My Lords,

"There appears to be two questions in this cause:—

* Taken by Mr Richardson.

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"1st. Whether there was really any power in the trustees to shut up the road; and,

"2d. Whether, supposing there was power, it had been duly exercised; and if it was not duly exercised, Was there any such *acquiescence*, or, according to the Scottish law, *homologation*, on the part of the appellant, as to prevent him from challenging the transaction between the Road Trustees and the respondent?

"There is no case in which it is more absolutely required of courts of law, to see that the interest of the subject is not taken away, than under such Acts of Parliament relating to navigations, roads, &c., &c. Upon the best consideration, therefore, which I have been able to give to the papers in this cause, and the Acts of Parliament, I cannot see that the road was shut up by competent authority. It does not appear that such authority was given by the Acts which I have looked into; but supposing that authority was given by the Act, any subject has a right to insist that the trustees shall exercise that authority in precise terms of the Act. If the trustees had the authority, and it was not duly exercised, then the question of acquiescence might arise; but it appears to me that the Court have decided the case on the notion that all was to be ruled with respect to the opinion that they entertained, that the road had been legally shut up.

"I would propose to your Lordships, not to reverse but to find, that the road was not shut up by any competent authority, and that the soil thereof was therefore not legally vested in the respondent, and to remit to the Court of Session, to review their interlocutors, regard being had to these findings.

"This finds that the road was not shut up by any competent authority, and therefore not duly vested in the respondent.

"It would be difficult to say that any right could be obtained by acquiescence, and it seems to me that the judgment on the ground of acquiescence, was affected by the opinion which the Court had formed, that the road was legally shut up.

Journals of the House of Lords.

Accordingly, it was ordered and adjudged as follows:—

The Lords Finds that the road in question was not duly shut up by any competent authority, or the soil thereof duly vested in the respondent, or those under whom he claims; it is therefore ordered, that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained in the said appeal, having regard to this finding, and thereupon to do what shall be just.

For the Appellant, *John Dickson, R. Hamilton, Pat. Walker.*

For the Respondent, *Jno. Tawse.*

[Fac. Coll. Vol. xvii., p. 462.]

PETER ARNOT, Merchant in Leith, agent for Redfern and Nettleship, Merchants in London, . . . } *Appellant;*

PATRICK STEWART, Merchant in Perth, *Respondent.*

House of Lords, 21st March 1817.

SALE—DELIVERY—RISK.—Molasses were ordered by the respondent, merchant in Perth, from the appellant's constituents, merchants in London, which order was received on the 21st February, and the goods were sent to the shipping wharf on the 24th; but no notice and no invoice were sent until the 27th, and this invoice bore that the goods were sent by the "Defiance," whereas, they were sent by the "Kinloch," which sailed on the 25th February, and was captured at sea. Held the buyer not liable for the price, as the invoice led him to believe that the risk was only to commence on the 27th. Affirmed on the ground that had the buyer insured, he could not have recovered under this representation.

The respondent ordered from Messrs Redfern and Nettleship, Merchants in London, the appellant's constituents, ten puncheons of molasses, to be forwarded to him at Perth. This order was received on the 21st of February. The goods were shipped on the 24th of February; but they did not despatch notice or send invoice until the 27th February. The invoice bore that the molasses were sent per the "Defiance," but the goods were sent to Dundee by the "Kinloch." The "Kinloch" sailed from London on the 25th February; and before the respondent was informed of this, she was seventeen days at sea, which precluded the possibility of obtaining insurance on the goods with her, for the voyage was usually completed in seven days; sometimes shorter. It turned out that she had been captured by a French privateer; and the respondent, had he insured the goods per the "Defiance," could not have recovered, from radical defect in the essentials of the policy.

The appellant's constituents insisted that the loss fell on the purchaser, "as the moment the goods are delivered to "the wharfinger, they cease to be ours, nor can we have "any interest in them."

Action having been brought for the price, the respondent stated in defence, that he was free from all liability, in consequence of the appellant's constituents having failed to give due notice of the shipment, and, also, in consequence of acting

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erroneously in stating the goods had been shipped by the "Defiance," whereas they were sent by a different vessel.

May 3, 1811. The Judge-Admiral, before whom the action was brought, pronounced this interlocutor:—"Having resumed considera- "tion of the petition for the pursuer, with defences in the "cause, &c.; in respect that the pursuer's constituents noti- "fied to the defender that they had sent to Miller's Wharf "the goods libelled for the 'Defiance,' and did not say they "were actually put on board that vessel, and that it is proved "the goods were sent, and that the 'Defiance' was then first "in commission for sailing: Finds that the pursuers are "nowise liable for the goods having been put on board the "'Kinloch;' repels the defences, decerns in terms of the "libel, and finds expenses due, subject to modification."*

June 7, 1811. On reclaiming petition prepared by counsel, the Judge-Admiral adhered, issuing the note below.†

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* Note by Judge-Admiral:—

"Nothing is more common than goods being sent by a smack "from London, different from what one is led to suppose they "were to be sent by, and sometimes in two or three smacks, "and on that account, insurance is made on the goods per "smack or smacks. The pursuers were to blame in delaying "to notify till the 27th of February, the molasses having been "sent to the wharf on the 24th. But the cause does not turn "upon this, because if they had given due notice, it would have "made no difference."

† Judge-Admiral's Note:—

"Redfern and Nettleship, by order of Patrick Stewart of "Perth, sent on the 21st of February 1810, goods to Miller's "Wharf, London, for him, to be sent by one of the smacks. "The smack then lying ready for sailing was the 'Defiance;' "but the shipping company shifted her and substituted the 'Kin- "loch' in her place, on board which Mr Stewart's goods were "sent. Redfern did not give notice of the goods being at the "wharf till 27th February, and in the letter, said that the goods "were for the 'Defiance,' but did not say when they had been sent "for the vessel. The 'Kinloch' sailed with the goods on the 25th "February, and was taken, but the 'Defiance' arrived safe. In "an action for payment, Stewart pleaded that he was not liable, "because the goods had not been sent per the 'Defiance,' and "delay had occurred in giving notice.

"I have already observed that it was negligent and unmercantile "to delay till the 27th, giving the petitioner notice of goods having "been sent to the wharf for the 'Defiance' on the 21st, or even on "the 23d of February; and had any loss been occasioned by such

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The judgment was brought under the review of the Court of Session by advocation. A proof was allowed and reported. And the Lord Ordinary (Bannatyne) having heard parties on the import of the proof, repelled the reasons of advocation, and remitted the cause *simpliciter*. On representation, the Lord Ordinary adhered, issuing the following note.* June 11, 1812.

" delay, I would have made the constituents of the pursuer liable " for it, *ex. gr.* Had the 'Defiance' sailed in the meantime with " the goods, and had been lost or captured before notice had been " given of their being aboard, the judge would have held the pur- " suers as the underwriters. But no evil whatever arose from the " delay, nor from the misrepresentation said to be communicated " by the letter of the 27th, which, by not mentioning when the " goods had been sent to the wharf, left it to be inferred that they " had only been sent that day; for, had Redfern and Nettleship " given notice of the day they sent the goods to the wharf; had " they mentioned in their letter of the 27th, that the goods had " been sent there on the 21st or 23d, it would not have made any " difference; still the notice would have been that the goods were " at the wharf for the 'Defiance,' and if insurance had been made, " it could not have covered goods aboard the 'Kinloch.' But the " loss arises from the goods having been not aboard the 'Defiance,' " but aboard the 'Kinloch,' which was taken. The judge, there- " fore, cannot make the pursuers suffer for a negligence that did " no harm. The only point in this case is, since the pursuers did " not write till the 27th, were they bound to have inquired at the " wharf whether the goods had been despatched or not? If they " had done this, they might have discovered that the goods had " been sent by the 'Kinloch;' but the judge apprehends that they " were not bound to make this inquiry, that in practice they did " all that was incumbent on them in sending the goods to the " wharf; *vide* Heseltines *v.* Arrol and Co., 15th January 1802; Fac. Coll. et M. p. 10,111. " Elton, Hammond and Co., *v.* Porteous and Dewar, 13th December Fac. Coll. Vol. " 1808, that they were entitled to trust to their being sent by the xv., p. 48. " 'Defiance,' and to run all risks for not having communicated the " goods being at the wharf. For these reasons the judge refused " the petition, and decerned for payment of the goods."

* Note by Lord Ordinary:—

" From the proof led, and the productions now made in this " case, it appears, in point of fact, 1st, That the goods in question, " which the Judge-Admiral, by a note subjoined to his judg- " ment, supposed to have been sent to the wharf by the persons " who made the furnishings on the 21st, were sent no earlier " than the 24th February. 2d, That at the time of their being " sent, it was the intention of the agent for the Dundee Shipping

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The respondent brought this interlocutor under the review of the Inner House (Second Division), by reclaiming petition.

" Company to have sent them by the smack 'Defiance,' though " by a subsequent change of arrangement they were sent by " the 'Kinloch.' 3d, That the advice given Mr Stewart as to " the despatch of his goods by Messrs Redfern and Co., was, by a " letter of Tuesday 27th, accompanied by an invoice, a note sub- " joined to which, stated the goods as sent to Miller's Wharf, 'for " ' smack "Defiance" of Dundee,' and the first which, when the " goods were sent, it had been in view to despatch. 4th, While it " is admitted that no post leaves London on Sunday, and it appears " that the manifest of the smack 'Kinloch,' in which the goods in " question were, in fact, shipped, and which sailed on Sunday the " 25th, was only despatched on Monday the 26th, and could not " reach Dundee earlier than the 1st of March; that the letter of " advice and accompanying invoice were, as above stated, des- " patched on Tuesday the 27th, and must have been received by " the respondent on the 2d March.

" Under these circumstances, the ground of imputing undue " delay to Messrs Redfern and Co., as to the time of sending advice, " which the Judge-Admiral supposed to have been from the 21st " to the 27th February, is materially narrowed, from its being now " established, that the persons employed to furnish them had not " sent the goods to the wharf earlier than Saturday the 24th, so " that Monday the 26th would seem to be the earliest day on " which Redfern and Co. could have sent advice.

" Still, had it appeared to the Lord Ordinary, that the omission " to insure was a necessary consequence of that delay, however " short, he might have probably followed out the intention said to " have been at one time expressed by Lord Gillies, of calling for a " report of merchants as to whether it was or was not to be con- " sidered such an undue delay, as was in practice understood to " throw the risk of any loss imputable to it, on the agent or other " person bound to give advice. But concurring with the Judge- " Admiral in opinion, that, as the representer had sufficient time " to have effected insurance on the goods after receipt of the invoice " and letter of advice on 2d March, and, in fact, several insurances " were effected on goods shipped by the 'Kinloch' after that date, " while, by making such insurance on goods by smack or smacks " the usual and accustomed way, even when the advice, as in this " case, names a particular smack, as that by which they are in " view to be sent, the circumstances of their coming to be shipped " in the 'Kinloch' in the place of the 'Defiance,' would not have " prevented the representer recovering under it. That the loss " which has here occurred, by the goods being shipped in the 'Kin-

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On advising which, the Court pronounced this interlocutor: —"Alter the interlocutor reclaimed against, advocate the "cause, assoilzie the petitioner, and decern: Find the peti- "tioner entitled to his expenses, allow an account thereof to "be given in, and remit to the auditor to tax the same, and "to report."* On further reclaiming petition, the Court adhered.

Jan. 26, 1813.

Nov. 25, 1813.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The constituents of the appellant having sold goods, and made delivery of them in due form, are entitled to obtain payment of the price.

2. The defence of the respondent, considered in a general point of view, is a complaint that, by a delay in notifying the shipment of the goods, he lost his opportunity of effecting insurance. It is answered, that in a case in which it is admitted that the vessels often accomplish their voyages in as short a time as the post conveys letters by land, a party meaning to effect an insurance ought not to wait the arrival of the letter of advice. By doing so, he demonstrates that he never had any serious intention to effect insurance. The complaint about insurance, therefore, is a groundless pretext, to which no attention is due.

3. The delay to send off advice of shipment of goods from Saturday to Tuesday thereafter, cannot in reason or justice have the effect to produce a forfeiture of the right to obtain payment of the price. To say that the delay may prevent insurance from being effected, amounts to an admission that the remark already made is correct, that a Scottish purchaser intending to effect insurance on goods commissioned from London, ought not to wait for the arrival of a letter advising that the shipment has been made.

"loch,' and that vessel being captured on the 2d March, cannot be "considered as the necessary consequence of the advice being sent "on the 27th in place of the 26th, under which view he did not "feel the calling for such a report to be necessary or proper."

* Opinions of the judges:—

"The Court altered the judgment on these grounds, 1st, That the invoice misled the buyer to believe that the risk was not commenced till the 27th, and that an insurance on that information would have been ineffectual, and 2d, That although no insurance was here made and avoided, the buyer was entitled to use his discretion upon just information."

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4. It is ascertained, that in practice, a London merchant is not bound to warrant that goods intrusted to a shipping company, shall be transmitted to Scotland by a particular vessel belonging to that company. Although the merchant intimates, that the goods are meant to be conveyed by one vessel, yet, if the company put them on board another, he is not held to be culpable on that account; and merchants must adapt, to such accidents, the form in which they effect insurances. If a merchant, sending goods on Saturday, do not forfeit his right to the price by a delay to send advice of the shipment till Tuesday thereafter; and if the London merchants are not bound to watch over the operations of shipping companies, it follows, that the constituents of the appellant did nothing improper, when they prefixed to their letter of Tuesday 27th February 1810, the true date on which it was written, and did not attempt to find out, and intimate the particular time and manner in which the shipping company had transmitted the goods in question.

Pleaded for the Respondent.—1. *Periculum rei venditæ, necdum traditæ, est venditoris,* if there has been any negligence on his part, in consequence of which the vendee is not enabled to take suitable precautions against loss. The vender is guilty of negligence if he does not notify, in due time, that the goods sold have been shipped, and are exposed to the perils of the sea. Now, Messrs Redfern and Nettleship, the appellant's constituents, did not give due notice; for though the molasses were shipped on the 24th February, they did not despatch notice till the 27th February, so that no notice was given for a period, during which the voyage from London to Dundee is sometimes completed, and a great part of it is always performed. By Redfern and Nettleship's negligence, the goods were in risk during all that period, while the respondent was not enabled to guard against loss.

2. If the vender gives false information to the vendee, by which any precautions taken by the latter against loss will be rendered ineffectual, the peril lies on the vender and not on the vendee. But Redfern and Nettleship gave false information to the respondent on two points, either of which would have been fatal to any insurance which might have been effected by him; *First,* The invoice was falsely dated on the 27th of February, instead of the 24th of February, when the goods were actually shipped; and an underwriter insuring on the representation, that the goods had not been furnished, and, therefore, could not have been put

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in hazard, till on or after the 27th of February, would have been liberated, on its appearing, that the hazard had commenced three days before. *Secondly*, Redfern and Nettleship stated, that the goods had been shipped on board of the "Defiance," which was an armed vessel, whereas they were shipped in the "Kinloch," which was unarmed; and any insurance proceeding on this false information, must have been void. Then information, too, in this particular, was altogether without excuse, because they were not entitled, without previous inquiry, to specify the "Defiance" as the ship by which the goods were to be carried. If they had inquired, they *must* have learned, that the "Kinloch" was to be the ship; one of the two alternatives, therefore, of necessity, follows, either, that they did not inquire, in which case, they ought not to have mentioned the "Defiance," or if they did inquire, they gave false and erroneous information.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"Being of opinion, that, if the respondent had insured upon this representation, he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment."

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby, affirmed. And it is further ordered, that the appellant do pay, or cause to be paid to the said respondent, the sum of £50, for his costs, in respect of said appeal. Journals of the House of Lords.

For the Appellant, *Isaac Espinasse, C. Abbott.*

For the Respondent, *John Greenshields, Fra. Horner.*

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FRAZER v. MACDONELL.

Lieut.-General SIMON FRAZER, sole surviving acting Trustee under the settlements made by the Hon. Lieut.-General Simon Frazer, late of Lovat, now deceased, } *Appellant.*

ALEXANDER MACDONELL of Glengary, *Respondent.*

House of Lords, 28th March 1817.

JUDICIAL SALE—CONSIGNATION—ADJUDICATION—CALCULATION OF INTEREST.—The appellant's author was the purchaser at a judicial sale of the estate of Abertarff, and the appellant objected to pay or consign the balance of the price, until the debts still affecting the estate sold were discharged. The Court of Session

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ordered him to consign £738, 6s. 6d., and to pay the respondent £1776, 8s. 9d. In the House of Lords, this was altered, holding that in the circumstances of this case both sums ought to have been ordered to be consigned, and that the said balance ought not to be paid to any person or persons, without notice to the appellant.

This was an action of count and reckoning betwixt the trustees of Lieut.-General Frazer, and Alexander Macdonell, Esq. of Glengary, for the balance of the price remaining in hands, of the estate of Abertarff, purchased by General Frazer (in whose right the appellant now was), at the judicial sale of the Glengary estates.

After General Frazer's death, his estates were vested in trustees, to whom he had conveyed them; the appellant being the acting trustee on these estates.

The appellant acknowledged a balance in the trustees' hands of the price of Abertarff, of £3514, 15s. 3d. But he stated that he was not bound either to pay or consign that sum, until the debts still affecting the estate sold by judicial sale, and due by Glengary, were discharged, amounting to the sum of £2278, 13s. 4d. And that the £200 over was little more than would cover the trustees' expenses.

A remit was made to an accountant, who reported the following debts as due:—

John Kressau, - - -	£134	13	9
John M'Arthur, - - -	19	17	0
Archibald Macdonell, - -	26	0	0
The Crown Debt, - -	758	15	8
Mrs Gordon of Glenbucket, -	583	15	9
	£1523	2	2

Leaving a reversion of £991, 13s. 1d.

But the appellant objected to this mode of stating the amount. He stated that, in estimating the subsisting incumbrances at £1523, the accountant had calculated erroneously, in so far as he only allowed interest on the principal sums due to the creditors from the dates of their respective debts. Whereas he ought to have calculated interest on the accumulated sums contained in their adjudication. Because it is quite settled in the law of Scotland, and is, indeed, a thing of every day's practice, that when an adjudication is led for payment of a debt, the principal sum and whole interest due thereon, are accumulated into one sum, which accumu-

lated sum bears interest from the decree of adjudication. It has been settled by many decisions, as well as by an Act of Sederunt, that the decree of sale at the instance of an apparent heir has the effect of an adjudication in favour of the whole creditors who are parties to the process. And it has also been settled, that the whole sums due to the creditors at the date of the decree of sale, carry interest from the time from which, by the decree of sale, the price begins to bear interest, the price being deemed a surrogatum for the lands over which the debts extend. This has been settled in a variety of cases, and particularly in the well known case of Brown *v.* York Buildings Company, 17th January 1792 (Mor. 13,339, et Fac. Coll., vol. x., app. 11). The title of this case given in the Faculty Collection of Reports, is this,—"Lands being sold judicially, the whole sums due "to the creditors, interest as well as principal, are held "as a capital at the period when the price begins to bear "interest." If the interest on the above debts, therefore, was calculated according to this rule, there would be debts due to the amount of £2278, 13s. 4d., leaving only £200 in hands, which is quite insufficient to cover the claim for expenses. Besides, there was a special agreement between the appellant and respondent, by which it was conditioned, that these incumbrances should be satisfied and discharged; and the arrestment by Ross and Ogilvy ought also to be discharged. In answer to this, the respondent stated, that General Frazer was not the purchaser at the judicial sale; he purchased Abertarff from Mr Hall, who bought it at the judicial sale. and, therefore, that this mode of calculating interest could not apply.

Creditors of Bonhard, July 24, 1739; Mor. p. 16453. Maxwell, *v.* Irving and Rome, June 20, 1747; Mor. p. 13349. Murray *v.* Blair, Nov. 7, 1793; Mor. p. 13344. Act of Sedt., July 11, 1794. Drummond *v.* Angus, 1754. Blackwood *v.* Hamilton, July 31, 1767. Mor. p. 13359; *et* Kilkerran, No. 4, Ranking and Sale; *et* Fac. Coll., vol. iv., p. 118.

The Lord Ordinary pronounced this interlocutor:— "Repels the objection of the sexennial prescription which "constitutes the first, second, third, and fourth objections "stated for Glengary, namely, the mode of calculating "interest, and of imputing payments of bygone interest, and "which forms a counter objection on the part of Lovat's "trustees; upon the whole, on this point, finds that the "rule adopted by Mr Hay in his report, ought to be followed "out to an end in the settlement of these accounts, 1st, As "being a rule which Mr Hay has stated in his report, was "agreed to by the parties before him, and, according to "which, the computation of the interest, and the application "of partial payments, was made in regard to that part of the "price of Abertarff paid by Mr Hall; and 2d, As Lovat's

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" trustees stand in the place of Mr Hall, a different mode of " computation, though more strictly legal, would demand " an alteration of what cannot now be effected, in regard to " that part of the account which has been adjusted, while " Mr Hall was the party; and, therefore, upon this point of " the cause, approves of the rule adopted by Mr Hay, the " accountant: Finds in regard to Glengary's gift from the " Crown, and of the final interlocutor sustaining the validity " of said gift, in competition with Lovat's trustees, that " Glengary is in full right of the debt contained in said gift, " and that any claim by Lovat's trustees thereon, cannot be " sustained in the present accounting, sustains the claim of " Lovat's trustees, for the articles of feu duty and duplicand " thereof, amounting at Whitsunday 1799 to £77, 15s. 6d., " and finds that Lovat's trustees are entitled to credit for the " sum as of that date: Finds that there are no sufficient " grounds for sustaining *in hoc statu* the alleged claims of " John Kressau,* John Macarthur, and Archibald Mac- " donell, reserving to them or to any who can show they are " in their right to claim upon the price, and against the " cautioners for the price, of that part of the estate of Glen- " gary, purchased at the judicial sale by Glengary himself; " sustains the application of the partial payment of £200 " sterling to Mr William Macdonell, upon 9th October 1784, " in extinction, 1st, Of the interest due at that date, of " £89, 5s. 7d., and the residue to account of the principal " then due, and decerns upon these points accordingly."

Dec. 22, 1810. After further discussion, the Lord Ordinary of this date pronounced this interlocutor:—" Having considered this " report with the objections thereto for the trustees of Lovat, " and answers for Glengary, and having resumed considera- " tion of the former reports and proceedings in the cause, " and heard parties thereon, ordains the trustees of Lovat to " consign in the hands of the Bank of Scotland £738, 6s. 6d. " for answering claims not yet adjusted in the ranking, " subject to the orders of Court; and, in the meantime, " decerns and ordains the trustees of Lovat to make pay- " ment to the said Alexander Macdonell of Glengary of the

* The objection to this person's claim of £75 was, that the bills constituting the same, were granted by a married woman, and, therefore, null and void. The objections to Macarthur, and Macdonell's claims were objections in point of form, but they formed no part of the question here appealed.

"sums of £991, 13s. 1d., and £784, 15s. 8d., mentioned on "page 15 of this report, both amounting to £1776, 8s. 9d. "sterling, being the remainder of the balance ascertained by "the report to be due by them, of the price of Abertarff; "and if these sums are not *paid* and *consigned* as aforesaid "by the term of Candlemas next, allows an interim decree "to go out and be extracted at the instance of the said Alex- "ander Macdonell of Glengary, against the trustees of "Lovat, for payment and consignation as aforesaid, and "decerns accordingly, reserving to the parties to be further "heard on the question of interest and expense, and upon "the claims of Archibald Macdonell, Kressau, and the heirs "of John Macarthur, as accords." June 12, 1811.

On two several reclaiming petitions to the Court, the Court adhered, and afterwards decerned for expenses, of this date. July 5, 1811. July 11, 1811.

Against these interlocutors, the present appeal was brought to the House of Lords by the appellant.

Pleaded for the Appellant.—By the law of Scotland, an onerous purchaser is not obliged to pay the price of lands, so long as real incumbrances affecting the same are undischarged. A decreet of adjudication, with the recorded abbreviate thereof, adjudging the lands in security of a debt, renders the debt heritable, and a real lien and incumbrance over the lands contained in the decree, in virtue of which the creditor may enter into possession and levy the rents; and after the expiry of the legal, and declarator to that effect, he may transfer his right into one absolute and irredeemable. General Frazer was an onerous purchaser of the lands of Abertarff from Mr Hall, in 1778. These lands Mr Hall had purchased at a judicial sale of the bankrupt estate of Macdonell of Glengary in the year 1769, and the appellant has been decerned to pay to the respondent the far greater balance of the price, and to consign in bank the remainder beyond his control, notwithstanding that adjudications for debts to the amount of that balance or nearly so, remain undischarged. The decree of sale at the instance of an apparent heir having, by law, the effect of a general adjudication for behoof of the whole creditors whose claims and interests are produced in the ranking, and having also the effect of accumulating their respective debts, whether consisting of principal, interest, or of sums not bearing interest by law at the time, into one capital or accumulated sum bearing interest from the term of Whitsunday 1769, the appellant is not bound to pay or consign until these incumbrances are discharged.

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2. Besides, it was here specially covenanted and agreed between the appellant and respondent, that before making payment of the balance of the price of Abertarff, the appellant and General Frazer's cautioner are "entitled to be "satisfied that the debts and incumbrances affecting the said "purchase, shall be fully extinguished and discharged."

3. The question as to the accumulation of interest, and the question in regard to the debts of Macarthur, Kressau and Macdonell having been reserved in the judgment for future discussion, there appears to be a manifest inconsistency in ordering the greater part of the fund to be paid over to Glengary, and the lesser part to be consigned. Besides, this fund is ordered to be paid over to Glengary and not to the creditors whose debts are still outstanding upon adjudication affecting the estate undischarged.

Besides, the arrestment used by Messrs Ross and Ogilvy in the hands of the appellant, ought also to be legally and effectually loosed to the full extent of the same.

Pleaded for the Respondent.—The appellant does not dispute the extent of the balance against him, which amounts to £2514, 15s. 3d. The appellant maintains that he cannot with safety pay or consign in terms of the judgment of the Court; but this plea is wholly unfounded, for he may with entire security make payment and consignation agreeably to the interlocutors of the Lord Ordinary and the Court. 1st, The appellant is in perfect safety to make consignation. This is so clear that, in arguing against it, he pleaded not that he was exposed to any hazard by consignation, but that it was more expedient that the money should remain in his hands, than be lodged in a bank. But if he be safe, it is no concern of his where the money shall be placed, since it neither does, nor ever can, belong to him. To the plea of expediency, the statutory provision and the practice of the Court in multiplepoindings, afford a sufficient answer. And certainly there has rarely any case occurred in which it has been more evidently the object of a debtor to retain money by means of wanton litigation, than the one under appeal.

2. The appellant is in safety to pay the £1776, 8s. 9d., because the order of the Court is a sufficient exoneration to a purchaser in a judicial sale with regard to the price, if he pays in obedience to such order; and, secondly, because the debts due to the Crown and Mrs Gordon, and to Archibald Macdonell, are now out of the question, because neither the Crown nor Macdonell have made any claim, and Mrs

Gordon's debt has been proved to be extinguished. The only other debts are those of Kressau's or Macarthur's representatives. It has been shown that they are groundless, but supposing them good, their amount, according to the accountant's report, is only £154, 10s. 9d., and the sum ordered to be consigned, is sufficient to meet it.

After hearing counsel,

The Lords find, that under the circumstances of this case, the whole of the balance due from the trustees of Lovat, of the price of Abertarff, ought to have been consigned in the same manner as the sum of £738, 6s. 6d., is by the interlocutor of the 22d of December 1810, ordered to be consigned; and that such balance, when so consigned, ought not to be paid to any person or persons, without notice to the trustees of Lovat. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of, and to do therein as shall be just. Journals of the House of Lords.

For the Appellant, *John Clerk, J. S. More.*

For the Respondent, *Sir Saml. Romilly, J. H. Forbes.*

ROBERT TOWART, Victualler, Glasgow, . *Appellant;*

ALEXANDER SELLARS, sometime Weaver in Glasgow, afterwards in Kirkintulloch, . *Respondent.*

House of Lords, 16th May 1817.

INSANITY—PROOF—ADMISSIBILITY OF DEPOSITION OF AN AGED TESTAMENTARY WITNESS—OBJECTION TO WITNESS—INTEREST—AGENCY.—(1) Circumstances in which deeds were reduced, on the ground of insanity. On appeal to the House of Lords, the interlocutors reversed. (2) A deposition was taken before a Magistrate *ex parte* from an aged testamentary witness, eighty-three years of age, in anticipation of an action being raised to reduce the deed; this was refused to be received in evidence after his death. (3) Held the deposition of a witness was not to be opened up, whose testimony had been objected to on the ground of interest, and acting as agent for the appellant.

James Maitland was owner of some heritable subjects situated in Glasgow; and having become embarrassed in his cir-

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cumstances, he found it necessary to execute a trust-deed in 1783, for behoof of his creditors. The trustees were empowered by this trust-deed, to sell the subjects for payment of the grantor's debts, and they were taken bound to pay over the reversion, *if any, to James Maitland, or his heirs.*

Robert Towart, the appellant, was married to James Maitland's sister; and he was, besides, his largest creditor. By a transaction with the trustees, he proposed to pay all the appellant's debts, on getting a conveyance from the trustees to the subjects then under their management. The trustees, accordingly, executed a disposition in favour of him and his wife, containing the same powers and conditions, that were in

July 6, 1784. the original trust-deed, and on this they were infeft.

Thereafter, by another deed, in consideration of the obligation undertaken by the appellant, and the present payment of an annuity yearly to James Maitland, the latter renounced his

Aug. 28, 1784. reversionary interest in these subjects, and discharged the appellant and his wife of all claims competent to him under the trust-deed or otherwise; and declared these subjects to be heritably and irredeemably vested in them, and their heirs in all time coming.

A few years before his death, James Maitland had executed a general settlement in the appellant's favour of what-

July 17, 1798. ever property should belong to him at the time of his death.

James Maitland died in the year 1806, without being aware that there existed any relation by blood, except his own sister (the appellant's wife), and her issue, who all predeceased him.

But sometime after his death, a claim was made by the respondent; which was followed up by the present action of reduction, brought to set aside the four deeds above mentioned, on the ground chiefly, that previous to their date, James Maitland was insane, and incapable of concluding any legal transaction.

The appellant denied in toto the fact of incapacity from insanity; but admitted that he had contracted habits of idleness and drinking, but when sober, was intelligent and in full possession of his mental powers.

A proof having been allowed, several objections in the course of the same were stated and disposed of by the Court.

Before the summons was brought into Court, the defender, apprehensive that he might loose the benefit of the testimony of Mark Reid, the only testamentary witness then alive, who

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was eighty-three years of age, applied to a magistrate to have his deposition taken, which was done accordingly. He afterwards died before the action was brought, and the defender having tendered this deposition in the proof, its production was objected to. The Lord Ordinary refused to allow this, and ordained the deposition to be withdrawn. On reclaiming petition to the Court, their Lordships superseded determining this point, until the cause should be before the Court for advising.

Another objection was stated in the course of the proof, to the testimony of Peter Peterson, which was rested on two grounds, *First*, That he was the appellant's confidential agent; and *Secondly*, That he had a *direct interest* in the cause, from holding an heritable security granted by the appellant over the property, and from being cautioner for loosening the arrestments, which the respondent was advised to use on the dependence, in the hands of the tenants on the property. The evidence of Peter Peterson was allowed to be taken by the Commissioner, and sealed up to abide the decision of the Court on the objections taken.

The Lord Ordinary (Craigie) allowed his deposition to be opened, and to form a part of the proof, reserving all objection to his credibility.

The Court, of this date, pronounced this interlocutor: July 10, 1813.
"The Lords refuse to open up the deposition of Peter-
"son, and find that *in hoc statu* it can form no part of the
"proof, and in so far alter the interlocutor complained of."
When the general import of the proof was estimated, it appeared, that of the eighty-one witnesses examined, *thirty-one* of these concurred in thinking James Maitland insane, and *fifty* agreed in thinking him of sound mind. Many of the latter had superior opportunities of judging.

Thereafter the Court pronounced this interlocutor on the merits: "Sustain the reasons of reduction of the deeds ex- Feb. 1, 1814.
"ecuted in the years 1784 and 1798, challenged, and reduce,
"decern, and declare accordingly; and as to the other deeds
"challenged, repel the defences, and also reduce the same,
"as titles to the subjects in question, and find that they
"only can be considered as a security, and as entitling the
"defender to be heard in the accounting, and reduce, decern,
"and declare accordingly; and remit to the Lord Ordinary
"to proceed in the accounting between the parties, and to
"hear counsel thereon, and on the other conclusions of the
"libel, and to do therein as he shall see cause: Find the

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May 14, 1814.

" pursuer entitled to expenses, ordain an account thereof to " be given in, and remit to the auditor to tax the same, and " to report."

On two several reclaiming petitions the Court adhered.

Against these interlocutors the defender (appellant) brought the present appeal to the House of Lords.

Pleaded for the Appellant.—The pursuer (respondent) undertook to prove, that the grantor of the deeds under reduction was insane. He cannot deny as to the import of the proof that at least the evidence is contradictory; but the appellant maintains, that on a due consideration of its whole import, the evidence decidedly preponderates in favour of the appellant, although even were that more doubtful than it is, the presumption of law would undeniably be in favour of the settlements.

The witnesses of the respondent are not only contradicted by those of the appellant, but they contradict each other in innumerable circumstances, many of which, too, of great importance. In particular, in regard to James Maitland's intemperate habits, they are completely at variance with each other—some stating that he was a confirmed drunkard, and others stating the very reverse.

Besides, in all the respondent's witnesses there is an evident tendency to exaggerate, and when closely pressed as to the grounds of their opinions, that tendency is quite manifest, some pointing out, as a proof of his supposed derangement, the negligence of his dress, and the outward appearance so naturally arising from his depraved habits; and others resting their conviction of his madness on frequent starting, talking loud, and other peculiarities and eccentricities of manner, which have been remarked, not unfrequently, in men of the most indisputable talents and soundest judgment. Such, however, was the criteria on which they arrived at the conclusion; but it is quite evident, that the question cannot be determined by the opinion of such judges, but by the evidence of the fact itself; and on the conduct which, for the most part, he manifested in the affairs of life. The subject of insanity, it is well known, is a difficult question, even among medical authorities, whose opinions are exceedingly various, and no one has yet been completely successful in giving a correct definition of it. But there is less difficulty in approaching the question here, when you have fifty against thirty-one stating, that the man was of quite sound judgment.

2. Even supposing the result of the evidence to be doubt-

ful; no sufficient reason has been shown for not permitting the deposition of Mark Reid (taken under circumstances that rendered any other procedure to secure it impossible), to form a part of the proof in process. By interlocutor of the 18th February 1812 the Lord Ordinary refuses to permit it to be received. But a petition having been presented against that judgment, the Court, by their interlocutor of the 5th June in the same year, superseded determining on the prayer thereof, until the state of the process should come to be advised. And yet, when the process was advised, no decision on this point is made, so that the point, whether Mark Reid's evidence should form a part of the proof, remains still undetermined.

3d, There is, further, no sufficient ground in this case, for not admitting Mr Peterson as a competent witness, reserving consideration of the credibility which may be due to his deposition as the agent of the appellant. In the cases of M'Latchie *v.* Brand, House of Lords, 27th November 1771; and M'Alpine *v.* M'Alpine, 2d December 1806 (Mor. App. 1, witness No. 4), the agents of parties in the cause were admitted as witnesses, under circumstances very much resembling, and, indeed, much stronger than any in the present question. In the latter of these cases, as in the present, the agent had executed the deeds under reduction; and was necessarily the best witness to those circumstances in which there must always be a *penuria testium*. And as to the other ground of objection against Mr Peterson, namely, that of interest in the issue of the cause, it is plain, from the respondent's own admission, that whatever interest he may have, is merely contingent, which has never been sustained in any one recent case, as sufficient to affect the admissibility of witnesses, although it may have some influence on their credibility.

Ante, vol. ii., p. 312.

Pleaded for the Respondent.—1st, On the question as to the opening the deposition of Peter Peterson, it is enough to say, that he, as the confidential agent for the appellant, advised all the legal proceedings in the cause, and among others, his own examination as a witness. He had also a direct interest in the issue, having obtained an heritable security to a considerable amount over the property in question from the appellant.

2d, On the merits; it has been proved that James Maitland was insane at the date of the deeds which have been reduced at the respondent's instance, as nearest heir on the father's side.

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After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"I do not agree that this is an extremely important case; for as on the one hand, justice is always anxious to protect persons of weak minds from their own acts, and where insanity is established at the time the deeds are executed, will set them aside, whether in their nature such as ought to be executed or not; so on the other hand, if a man of weak intellect executes a deed which would not be proper if executed by a man of the strongest mind, it is not for us to say, that, because God has at one moment afflicted a person with such a malady, he shall, therefore, never be restored so as to be competent effectually to do an act which a moral and good man would think it most proper to do. The principle in our law is clear; and I do not know any difference in that respect between the principle in our law, and that of the law of Scotland. I remember the case of a gentleman, who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a disposition of his property, which was exactly that which he ought to have made, having regard to the circumstance, that he had before provided for some members and not for other members of his family; and, that which he, before his insanity, communicated to a friend, he intended to make; and he did it under a sense of his situation, and the impression that no time was to be lost, and to protect himself against a relapse. That was held to be a good deed. For the question is not, whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed, which ought to give it effect.

Faulder v. Silk, in K. B., Dec. 9, 1811. 3 Camp., p. 156.

"Another principle which we may safely lay down, is this, if property has been disposed of twenty or thirty years before, formally, and with the concurrence and assistance of individuals of good character; and if that disposition is not quarrelled with as speedily as may be, and only challenged when the parties best acquainted with the whole circumstances of the transaction, are dead and gone, it is dangerous to set aside that disposition at the distance of twenty or thirty years, upon a ground so fallible as human memory, and testimony as to the state of the person making that disposition at other moments without at all applying to the moment when he executes the deed.

"After these general observations, see what these deeds are. On the 20th December 1783, he makes a disposition of his property, proceeding upon this narrative: "That I am at present 'owing to sundry persons considerable sums of money, which I 'am unable to repay, but which it is most just and reasonable 'should be paid and discharged as soon as possible; that I have

'no other fund for that purpose, but the heritable subjects after 'described, from which I expect a considerable reversion will arise 'to me after payment of my debts; but from my particular situa- 'tion at present, I incline to trust the management of my affairs 'to the persons after-named, my creditors and friends, in whom I 'have an entire confidence." What the particular situation was I do not know; the witnesses are in their graves; but one of the witnesses to the deed of 1798, in which he recites, that he was apt to be made the worse of liquor, and to be imposed upon by designing persons, says, that he read it over himself, took it away with him, and kept it by him for sometime, and, at a second meeting, executed it. In the recital to this deed of 20th December 1783, he might perhaps allude to the calamity with which he had been afflicted. But if God afflicted me two years before with such a calamity, and I made a disposition of my property, reciting, that I was afraid of the consequences of a relapse, whether it were the fear of imprudence, as in the Middleton case, or the fear of disease; is it to be held, that because a man recites that reason for doing the very thing which he ought to do, he is, therefore, not sufficiently recovered to rendered him competent to do that act? Then the narrative proceeds:—'Therefore, I do 'hereby, with the special advise and consent of James Blair, my 'grandfather,' &c.; so that he was acting by the advice and with the consent of his grandfather, Glen and Scott, who, in this year, 1783, had been engaged in many transactions with Maitland, making no objection; and this is no small circumstance in the absence of other evidence as to his state of mind at the moment of executing the deed. The trustees were in the first place to sell parts of the property for payment of the grantor's debts, *without any control from him.* That clause is not uncommon in instruments in this part of the island, and here again, I refer to the case of Chirk Castle estate.

Middleton v. Kenyon (Ld), 2 Ves. Jun., p. 391.

Middleton, *ut supra.*

"I wish to call your Lordships' attention particularly, that at the time the deed was executed, he was aware that he had to defend suits carried on against him by this Towart; and there was a special provision in the deed, that the trustees should be at liberty to defend the two processes, one before the Court of Session, the other before the Magistrates of Glasgow. This deed appears to have been executed with great particularity as to the date, the names of the witnesses, and the name of the writer of the deed. Then, with reference to the deed of December 1783, Glen and Stcot, who had been concerned with the grantor in that year in certain bills of exchange, and transactions of business, and who, as far as we know, were respectable persons, are parties to it, and they are to sell and pay his debts, and give the reversion to the grantor; and all this with the concurrence of his grandfather.

"Then it is said, that Maitland enlisted as a soldier, and was

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unable to do his exercise, a defect which I have known to belong to many worthy and sensible men. And they fix upon certain acts, which might be material if they had applied to the moment of executing the deed.

"Then the deed of 6th July 1784, proceeding upon the narrative of the trust-deed of 1783, and the purpose for which it was granted, was executed. It does not appear that Maitland himself was a party to this deed. But then, consider what a man may rationally do. Blair, the grandfather, or Glen and Scott, had no authority to execute this deed of July 1784, unless they had the consent of Maitland; and you must suppose that they were satisfied that they had his consent, unless they meant to be responsible for the acts of Towart and his wife, which, without that consent, they would be.

"Then the deed of August 28, 1784, was executed; and from this it appears that Maitland was served heir to his grandfather, and duly infeft on the 17th August 1784, a circumstance of great importance, though not noticed in the reasoning; and what follows upon that? A sale of a certain parcel of the land to one Armour, and a wadset for £100 on the 18th August. Is not this a transaction that deserved some attention? One who was supposed to be insane, served heir to his grandfather, and infeft on the 17th August, and selling and mortgaging his property on the 18th! Then it recites that the debts which he owed had been paid by Towart; and here be it noticed that Glen was a creditor to the amount of £144, and was paid his debt under these instruments; and then he conveys the property to his sister and her husband, subject to the payment of £100 mortgage money and of an annuity of £13, and £3 per annum for clothes to himself.

"It was said that he would not have executed this deed, if he had not been insane. Now, I don't say that if he had been insane, the deed would have stood, though the consideration had been more than sufficient. But still that is a circumstance to be attended to; and the only evidence we have here is, that the consideration was more than sufficient. But if it had been less he might have intended to make a gift to his sister and her husband; and a payment of this description was well enough calculated for a person in his situation, and the use which he made of the money when he received it. Before the commencement of this process, all the witnesses to this deed were dead, except one, of the name of Reid. Reid also died before he could be examined in the cause; but he had been examined on this subject before a magistrate of Glasgow and two witnesses. His deposition was not admitted; but the objection to it might have been waived, and there appears to have been no bad reason for insisting upon it.

"We have no means, therefore, of knowing the state of Mait-

land's mind, except from these deeds themselves, and the parole evidence, till the execution of the deed of 1798, which was a *mortis causa* disposition. This deed bears on the face of it, that Maitland had favour and affection for his sister, and one of the witnesses speaks to the admission by Maitland, that he, in fact, had that favour and affection. The witnesses say that he read this disposition aloud, that he said he would think about it, took it away with him, and afterwards signed it. Then, as to the only instrument, the witnesses to which were alive, they speak to his sanity; and though they might have judged wrong, they must have been convinced that he was of sane mind when he executed it. This deed professes to give over all the property and all the claims which he then had, or might have at the time of his death; and then he states that he was apt to be made the worse of liquor, and liable to be imposed upon, and, therefore, does this act. And is it to be said that, because he chooses to allege that reason, which is the true one; therefore, this and the other deeds are bad, though not quarrelled with till 1808, the respondent being in a situation which enabled him to challenge them at a much earlier period?

"Then the case comes to this, supposing Maitland to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. And the question is, whether this mass of written evidence in support of his sanity at the moment when these deeds were executed, which cannot now have its full weight, but which must be considered as at any time very weighty, is so affected by the parole testimony of persons speaking to his condition at other times, that you can say, at the risk of what belongs to such a decision, that the deeds were executed by a man, not by one liable to be imposed upon, for that is not this case, but by a man entirely incompetent to do such an act.

General insanity is not sufficient if the party was sane at the time the deed was executed.

"It often happens in these cases, that when witnesses are describing the condition in which the man was two or three years before, there are no cases more difficult to deal with; the witnesses on the one side describing him as being as mad as mad can be; and those on the other side representing him as a man of the strongest and the soundest intellect. Like the smuggling cases which we sometimes had in the Exchequer, where the question was, whether a vessel was within three leagues of the coast, with barrels of a certain size, while the evidence on one side was, that she was not three leagues from the coast, the evidence on the other side generally was, that she was at least twenty leagues from it. So, in these cases, the witnesses on the one side swear that the person whose sanity is in dispute, was one of the weakest; and those on the other side swear that he was one of the strongest minded men that ever existed. But the

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question is not, whether this man was weak, or whether he was mad when in liquor, or insane at other times; but whether in 1817, when the deeds challenged, are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who give testimony which would support that deed in any case, whether you can say that these deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles), at such a distance of time, and under such circumstances. In my opinion, that would not be safe, and I cannot consent that this judgment should be affirmed."

LORD REDESDALE:—"I concur in that opinion, and I confess this case appears to me very important. With regard to the words in one of the deeds, that the trustees were to act without control, they are not uncommon in English deeds of this nature. As to the decision of the Court below, that must be varied even on its own principle. It is uncertain, for one cannot see what are the deeds impeached by it; and it is inconsistent, because the deeds, if they be reduced on the ground of utter incapacity, cannot stand for any purpose.

"The deeds are impeached by parole evidence only, which is an important circumstance; and that evidence is applied generally, and not particularly, to the time when the deeds were executed. The allegation is, that since 1781, or 1782, Maitland was utterly incompetent to execute any instrument, and that was attempted to be made out by parole evidence, without any qualification whatever. But on that case the Court below has not decided. On the other side there is likewise strong parole evidence.

"Now, in endeavouring to find out the truth from contradictory evidence, by the test of collateral circumstances, as to which there can be no doubt, let us analyse the evidence, in order to ascertain how far it is consistent with these circumstances. Having gained this ground, we have all that is necessary to dispose of the cause; for, when the evidence is so tried, it appears clear that the respondent's evidence cannot be true, and that the appellants' evidence may be true. The evidence of the respondent's witnesses is inconsistent with the collateral circumstances. They represent him as utterly incompetent from 1782. Now, in the first proceeding, the respondent did not quarrel with the deed of December 1783; so that he then had no conception that Maitland was at the time of the execution of that deed, in the state of mind which he afterwards attributed to him. The respondent did not then pretend to reduce the deed, but treated it as a rational deed executed by the advice and with the concurrence of respectable persons; and it appears, that about that time, Maitland was engaged in a variety of dealings, utterly inconsistent with the evidence of notorious incapacity. The deed of the 14th May 1784, was executed by the grandfather, and

Glen and Scott, and was sustainable on the same grounds as that of 1783. Now, what appears from that deed? 1st, That Maitland had executed a bond for what was due to his sister. That was a distinct instrument, executed with the approbation of his grandfather and the other trustees. Do they not declare, then, that he was then competent? They had engaged to defend the suit, and this was a compromise of it. The persons who prepared these deeds, and who were parties and witnesses to them, were dead when the process commenced; and we must take it that they would have sworn that he was competent; for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe, if that were not a principle of law. But the matter does not stop there. Part of the consideration in this deed is 5s. a week, or £13 a year, to be paid to Maitland. Now it is in evidence that he was in the habit of receiving this 5s. per week, under the deed; and the notes he gives acknowledging the receipt, written by himself, are in evidence; and from them it is demonstrable that Maitland was not in the condition in which he was represented to be by the respondent's witnesses, for these notes show that he was capable of knowing what he received and ought to receive. He writes acknowledging the receipt of what was due to him, and expresses his hope that his sister and her child are well. Is that the language of a man in such a state that he could do no rational act? This written evidence is worth a host of parole testimony, as it demonstrates that the evidence for the respondent cannot be true.

"The next point is the consideration. It has been said that the property was more valuable than the consideration paid for it; and with reference to that, it ought to be recollected that there was a diminution of ten acres, sold to Armour. That, too, is a transaction in which other persons were concerned, as well as Armour, who advanced the money, and all of them are, in effect, witnesses of Maitland's sanity; and it was impossible they could have so acted if this man had been, as the respondent's witnesses represented him to be, notoriously insane.

"The length of time, too, that elapsed, from 1784 till 1807, was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is, to impeach all these transactions. If, then, the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807, or 1808, when the value was so different? The delay, too, had a tendency to deprive the appellant of the means of showing that Maitland was of sound mind at the time of executing the deeds;

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and in that view also the length of time is an important feature in the case.

"Upon the whole, therefore, it appears to me that the decision of the Court below cannot be sustained. It is not consistent with the nature of the proceeding, which impeaches these deeds, on the ground of utter incapacity since 1782. But the judgment does not apply to that case, as it sustains the deeds to a certain extent. The result is, that the evidence for the respondent is not sufficient to reduce these deeds. There is positive evidence to support them, as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or, at least, that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is, on the one side, clear, positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of doubtful balance of testimony, but the appellant's evidence is decidedly the stronger.

It is ordered and adjudged that the said interlocutors complained of be, and the same are hereby reversed. And it is further ordered, that the defences be, and the same are hereby sustained, and the defender (appellant) be assoilzied.

For the Appellant, *John Clerk, John Blackwell, Andrew Skene.*

For the Respondent, *John Leach, John Jardine.*

[Fac. Coll. Vol. xvii. p. 606.]

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GEDDES v. PENNINGTON.

JOHN GEDDES of Verreville, Glasgow, . *Appellant;*

DAVID PENNINGTON, Horse Dealer, Glasgow, *Respondent.*

House of Lords, 16th June 1817.

SALE OF HORSE—BLEMISH—REPETITION of PRICE—WARRANTY EXPRESS.—An action was raised for repetition of the price of a horse, bought expressly warranted "free from vice and every blemish," and a "thorough broke horse for either gig or saddle." The horse, when on a journey in harness, plunged, ran off, and broke the gig. Held, in the circumstances as proved, that the

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buyer was not entitled to repetition of the price. Affirmed in the House of Lords.

An action was brought by the appellant, to have repetition of the price of a horse (£84), sold to him by the respondent, warranted by the respondent, by letter, in the following terms:—"I warrant this horse sound, free from vice and every blemish. He is quiet in harness, and sure-footed, and a thorough broke horse for either gig or saddle."

It appeared, that both before the sale, and for three weeks thereafter, the buyer had had opportunities of testing this warranty, by driving the horse in a gig. And for about two months, he, as well as his sons and friends, frequently drove the horse in a gig, and it was found, that in this respect, the horse answered the character given of him. However, having occasion to go on a journey from home, in going down hill in the gig, the horse plunged and kicked, ran off, broke the carriage, and threw the appellant and his wife to the ground.

It likewise appeared in evidence, that Pennington had bought the horse sometime before from Mr Anderson, Edinburgh, for sixty guineas, who explained to Pennington at the time, the qualities of the horse, and that, in particular, the reason of his selling the horse was, that having made use of him to run in the gig for sometime, he kicked and plunged and ran off on a late occasion on the Queensferry road, when the gig was overturned, and broken to pieces, and his own and his wife's life endangered; Pennington, in selling the horse again to Geddes, concealed these facts from him.

These, and other facts having been proved, the magistrates decided, that there was a breach of the warranty, and decerned for repetition of the price.

In an advocation of this judgment to the Court of Session, the Lord Ordinary (Alloway) pronounced this interlocutor: "The Lord Ordinary, having considered this bill and answers, June 22, 1813.
"with the Inferior Court process, on account of the very great
"litigation which has already taken place, and that the cause
"appears now to be ready for an ultimate decision; appoints
"the bill and answers, together with the proof, to be printed
"at the mutual expense of the parties, and copies thereof to
"be put into the Lords' boxes, in order that the same may
"be reported to the Court."*

* Note by the Lord Ordinary:—
"This is a difficult case. This horse was two months, all but

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The cause was then reported to the Court; and the Court, after hearing counsel, remitted to the Lord Ordinary to pass the bill *without caution*, giving the opinions as noted below.*

" four days, in possession of Mr Geddes without complaint, al- " though he constantly used him in a gig. And the horse never " seems to have been unsteady, except during the last journey, in " which two instances are mentioned. As a horse might easily " acquire bad habits from careless driving, or otherwise, during " that time, this could afford no pretence for returning the horse.

" The difficulty is, that Anderson had sold him to Pennington " on account of the accident which happened at Queensferry Brae. " But yet Anderson had no scruple of granting a certificate, stating, " that he was regularly trained to harness. Although he mentioned " to Pennington the accident at Queensferry, and told him he had " never afterwards driven him in a gig, Pennington finding the " horse perfectly quiet, and having repeatedly exercised him in the " gig, was entitled, *bona fide*, upon three weeks' trial of the horse in " that way, to warrant him as safe in harness, when he again sold " him to Mr Geddes. He ought, perhaps, to have mentioned what " happened at Queensferry. This would have been very fair. But " if he had imputed that to accident, and the horse had been cured " of fault in that respect, which seems to have been the case at the " time of the sale, he might have *bona fide* sold the horse as a good " horse. And that he was a good gig horse, for nearly two months " after the sale, is certain.

Jardine v. Campbell, Jan. 15, 1806. M. Sale, App., p. 13.

" As to the case of Campbell and Jardine, so much founded on, " the horse was returned in ten days. He was warranted sound; " but it was proved he was afflicted, at the time of the sale, with " running thrushes of considerable standing. So that case does not " decide the present.

" But as the act requires bills of advocation to be passed on " *caution*, the Ordinary does not think himself warranted to dis- " pense with it in the present case, by pronouncing an interlocutor " to that effect. And he has, therefore, ordered the bill and an- " swers to be printed, in order to report it."

* Opinions of the judges :—

Lord Succoth.—" The difficulty is where the Lord Ordinary puts it, in his note.

" The warranty by Pennington to Geddes is, that the horse is ' free from vice, and steady in harness.' This is strong and express; and no mention was made by Pennington of the accident at Queensferry, although this was particularly mentioned *to him* by Anderson. Thus, a *concealment* of a material fact in the history of the horse, took place.

" I doubt if it be a sufficient answer, that Pennington had reason to think he was *cured*, because he had gone quietly with

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On the case being again heard before the Lord Ordinary, the respondent pleaded, that the horse had been proved to conform to the warranty. He had traced its history, and all the witnesses agreed in this, that the horse was steady and gentle in an uncommon degree. And so far from being addicted to running off, or unfit for harness, he had the horse driven in a gig sometimes by his children, and occasionally when there was no fewer than four in the gig. He was led down a close yoked to a gig, and down two steps of stairs. He was repeatedly left standing in the streets of Glasgow, yoked to the gig, without any person holding him. So that the whole character of the horse showed the reverse of that of a vicious animal, or a horse unfit for a gig, or inclined to run away. The accident which occurred in going down hill, must, therefore, have occurred from some mismanagement on the part of the appellant.

Besides, the appellant had kept him for two months without making any complaint, or offering to return him as disconform to warranty.

The Lord Ordinary (Gillies) pronounced this interlocutor: "Sustains the reasons of advocation, advocates the cause, "assoilzies the defender (respondent) and decerns: Finds the "pursuer liable in expenses: allows an account thereof to be "given in, and remits to the auditor to tax and report." Dec. 9, 1813.

On reclaiming petition, the Court adhered.

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him for sometime. He probably was *constantly* on his *guard* and a good whip. The length of time before returning the horse, I think, will not bar the action in this case, where the vice or fault showed itself only *very seldom*, and not every time the horse was in harness. There is some appearance that Mr Geddes managed the horse unskilfully in the driving, but this is not clearly made out."

Lord Hermand.—"The accidents all arose from unskilfulness of the driver. The horse was originally quiet."

Lord Balmuto.—"I am for passing the bill without caution. There is a clear proof, that he was quiet, and the accidents arose from the bad management of the drivers."

Lord President (Hope).—"The bill should be passed *without* caution, for the fault was in the *driver*, not in the *horse*. Anderson had driven the horse all about Edinburgh, and nothing happened until the accident at Queensferry Hill. It is said, that he kicked at this hill *without any cause*, but it is not explained, whether there was any breaking of the horse or not after that date. If a man whips a horse and checks him at sametime, the whip ought to be applied to him—not to the horse."

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Against these interlocutors, the present appeal was brought to the House of Lords, by the pursuer (appellant.)

Pleaded for the Appellant.—1st, It was clearly proved, that the horse in question was not in terms of the respondent's warranty *a thorough broke horse for a gig.* 2d, The breach of the warranty in this case must be held to have been incurred, even if the respondent had shown, that at the time of the sale, he acted *bona fide* in representing the horse as free from vice, and a thorough broke horse for a gig; but the evidence shows, that he was in *pessima fide* so to represent the horse, he having been informed what befel Anderson on the Queensferry road, who cautioned him not to sell the horse as a gig horse. The concealment of this, and other circumstances, and the misrepresentation of the respondent were grossly fraudulent, and must vitiate the contract.

Pleaded for the Respondent.—The action is founded on the respondent's warranty, that the horse sold by him to the appellant was sound, free from vice and blemish, quiet in harness, sure footed, and a thorough broke horse for a gig. The breach of this warranty assigned by the appellant, is that the horse was vicious, being habitually addicted to running away, and unfit to be used in a gig; and, therefore, that he is entitled to recover back the price under the respondent's warranty. But, *First*, he failed to recur to the warranty *debito tempore;* and *Second*, he also failed to prove the alleged vice of the horse, and its unfitness to be used in a gig. The accidents alluded to, besides, must have occurred from unskilful driving, and not from any viciousness in the animal.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

" My Lords,

" In this case, which is certainly somewhat difficult to deal with, it is stated, that a sum of £215 has been awarded as the costs of one of the parties, and the question is no more than this, whether a horse answered the warranty given by Pennington to Geddes, in this letter, in which he says, " I have this day re-' ceived from your son, Mr Archibald, £84 sterling, the price of ' my dark bay horse sold you. I warrant this horse sound, free ' from vice and every blemish. He is quiet in harness, and sure-' footed, and a thorough broke horse for either gig or saddle."

" It has been admitted on all hands, that the horse was sound and free from vice, except as afterwards mentioned; and that he

was quiet in harness, if along with another horse. But the question is, what was the demeanour of this horse in a gig? My noble predecessor could have better dealt with this case, and I wish it had fallen to his lot, and not to mine, to advise your Lordships in the decision of it. But as it is, I must deal with it as well as I can.

"It seems, that three of the judges below were of opinion, that this was a good horse for a gig. And one of them said, that it was very indiscreet to whip a horse and check him at the same time, and that, in his judgment, the whip ought to have been applied to the man rather than to the horse. Pennington had represented, that this was one of two horses sent to him from England, to be disposed of, which was not the fact. One of the judges says, that this was nothing at all; and I agree with him so far, that, if the warranty is answered, a misrepresentation as to the place from which the horse was procured, will not suffice to set aside the sale. But then, the misrepresentation may be a material consideration with respect to costs. Another judge seems to think, that, on account of this misrepresentation, Pennington could not successfully defend the action. That I conceive not to be correct, if it is made out that the horse answered the warranty.

"The appellant kept the horse two months. I have not had experience of late in Courts of law; but I understand, that, in this country, the time within which a horse ought to be returned, in cases of this kind, depends very much upon the period when the defect is discovered.

"But the principal question here is, whether the accident was owing to vice in the horse, or want of skill in the driver. And as to that, I think that the three judges below were right. But still, it is a doubtful case, and on that account, it may be improper to give the respondent the costs of the appeal; and another reason for not giving costs, is the improper misrepresentation, for the object of it must have been, to prevent inquiries which might lead to the rejection of the horse. But that misrepresentation will not invalidate the transaction, if the horse was a fit horse for a gig at the time he was sold. I propose, therefore, to your Lordships to leave the matter as it is, without giving costs to either side. My noble friends concur with me in this view of the case. Judgment affirmed. No costs on either side."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *John Clerk, J. Cunninghame.*

For Respondent, *J. Greenshields, Fra. Horner.*

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WHITE v. BALLANTYNE.

WILLIAM WHITE, the Nephew, Heir-at-Law, and one of the next of kin of John Dalgleish, deceased, ... } *Appellant;*

ROBERT BALLANTYNE of Phahope, residing at Dryhope, in the County of Peebles, *Respondent.*

House of Lords, 17th, June 1817.

REDUCTION—FACILITY, FRAUD AND CIRCUMVENTION.—A deed of settlement having been challenged on the head of facility in the grantor, and fraud and circumvention on the part of the grantee, the reasons of reduction were repelled in the Court of Session, but in the House of Lords, case remitted for reconsideration, with certain declarations made.

The appellant brought an action of reduction as heir-at-law of the deceased John Dalgleish, to set aside and reduce a testamentary disposition executed by him before his death, on the 3d day of February 1808.

The chief ground of challenge was, that at the time this disposition and settlement was executed, John Dalgleish, the grantor of this disposition and settlement, was a man of very weak and *facile temper*, and at same time much addicted to drinking. 2d, That the said settlement was highly irrational in itself, inasmuch as it disponed a very considerable and valuable property to the defender (respondent), a very distant connection of the grantor, to the prejudice of his whole near relations; and 3d, That the foresaid disposition was obtained through concussion on the defender's part, while he detained the said John Dalgleish in his house, apart from his relations and friends, who were not permitted to see him; and the deed was thus impetrated by the defender, through gross fraud and circumvention on his part, and through facility on the part of the grantor.

It further appeared, that in consequence of a letter received, Mr Cairns, the writer, went to the respondent's house, where John Dalgleish then was, and received his instructions to make the will of February 1808. The jotting of these instructions written down by him was, that John Dalgleish appoints Mr Ballantyne of Phahope (respondent), his executor, burdened with his debts, and funeral expenses;—the land to Mr David Ballantyne; £100 to William White; £100 to Alexander White; £100 to Elizabeth White, &c., and lastly, £300 *to Mr David Ballantyne, besides the land.*

But instead of the deed being made out conformable to this jotting, the land was conveyed to Robert Ballantyne, and only £300 to David Ballantyne. No proper explanation was made of this discrepancy; and it was not proved that the deceased was informed of it; but, conscious that this could not stand scrutiny, a letter was concocted by Mr Cairns and the respondent, in order to explain this away. This letter was signed by Robert, and addressed to Mr Dalgliesh, and, instead of being dated of same date with the deed, was dated 7th September 1808, setting forth: "Sir, I understand that, by the disposition and assignation, dated 3d February 1808, granted by you to me, as executor, with the burden of certain legacies therein mentioned, you also disponed all and whole these two pieces of land, the one lying in the Bridgelands of Peebles, and the other lying in the Kirkland of Peebles, bounded and described as particularly mentioned in the title-deeds thereof; and as you declare that it was your intention to have disponed these two pieces of land to David Ballantyne, my brother, *but which could not be properly done at the time, for want of the title-deeds to give a particular description of the lands*, I hereby bind and oblige myself and my heirs, if the disposition granted by you to me stands unaltered at your death, to grant to the said David Ballantyne, immediately on that event, a valid disposition to the said two pieces of land."

In Cairns' evidence, it was deponed that the deed of 3d February 1808, when executed, was sealed up and delivered into his custody, and so remained *without being shown to any one till the packet was opened after the testator's death.* The letter therefore, it was strongly represented, was a device, an *ex post facto* operation, to disguise the whole transaction.

A proof was allowed and reported. After memorials were given in, the Lord Ordinary, finding a difficulty from the contradictory nature of the proof, ordered the cases to be printed and boxed to the judges of the First Division. July 8, 1813.

After hearing parties, and considering the memorials, the Court pronounced this interlocutor:—"Repel the reasons of "reduction, assoilzie the defender from the conclusions of the "libel, and decern: Find the pursuer liable in the expenses of "process, allow an account thereof to be given in; and remit "the same, when lodged, to the auditor of Court to tax and "report." Jan. 21, 1814.

Against these interlocutors, the present appeal was brought by the pursuer (appellant) to the House of Lords.

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Pleaded for the Appellant.—1st, John Dalgleish, the alleged testator, is proved to have been a man of the weakest understanding, and of that facile disposition which renders it incumbent on those favoured, to show that the will was his spontaneous act, and that there was no means used, but the utmost purity on their part. So far from this being the case, it is here proved that the respondent intruded himself into the management of Dalgleish's affairs, set him at variance with his relations without cause, excluded them from all communication with him, kept him, in truth, a prisoner in his own house, where he was allowed to have little or no intercourse with any one out of the respondent's family, and thus he acquired and exercised a complete ascendency over him, evidently with a view to obtain his property in the way in which the instrument in question conveyed it. The respondent has failed in his proof of capacity. He did not produce a single witness to whom the deceased was intimately known, and all the witnesses are either his own servants or others under his control.

2d, It is proved and admitted that the disposition of a considerable part of John Dalgleish's property purported to be made by the instrument in question, was not agreeable to, but directly contradictory to his instructions and his intention, and, therefore, the instrument cannot be considered or supported as his will. There is no evidence of Dalgleish's being subsequently informed of the error (if it can be ascribed to error), and acquiescing in it, or converting what was an absolute gift, into a trust for another, by the declaration of the donee; nor was that a proper or *habile* mode of conveying property, or ascertaining the will of the alleged donor, even allowing the respondent's letter not to have been an *ex post facto* fabrication, which there is every reason to believe it was.

Pleaded for the Respondent.—1st, It is fully established, not merely by the testimonies of the witnesses, but by the real evidence in the cause, and by the conduct of the appellant himself and his friends, that John Dalgleish was possessed of understanding and capacity sufficient to qualify him for making a settlement.

2d, There is not only no evidence brought, that the deed was impetrated from, but it is clearly established, on the contrary, that the settlement under reduction was the genuine deed of Mr Dalgleish, freely and voluntarily executed by him, and, therefore, entitled to be regarded as the rule for the distribution of his property. It would be irrelevant and

incompetent to defeat this deed by parole evidence, and the testator intended something different. But, in point of fact, there is no such evidence in the case; for, although the writer of the deed has made it appear that the testator intended the land for David Ballantyne, yet his deposition must be taken in whole, and not separated into parts; and then it will appear from the same evidence, that there was no mistake, and that the testator meant his intention to be carried into effect, by conveying the whole, in the first place, generally to the respondent, and taking an obligation from him afterwards to dispone particular subjects to David Ballantyne. This was accordingly done, so that the testator's intentions have in every respect received effect.

After hearing counsel,

It was declared by the Lords, that it is established in this cause, that John Dalgleish was of understanding and capacity sufficient to enable him to execute a settlement of his property, if he should be duly and fully informed of the nature and effect thereof. And it is ordered that with this declaration, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, in the said appeal, having regard to all the circumstances of this case, and having more especial regard, as far as the Court's forms of proceedings will permit, to the facts and circumstances following, viz., to the fact that the jottings respecting John Dalgleish's settlement contain the following words:—"The land "to Mr David Ballantyne," and "Three hundred pounds "to Mr David Ballantyne, besides the land."—The fact that the settlement, nevertheless, containing a disposition of £300 to David Ballantyne, contains no disposition of land to him. The fact that the reason given by Mr James Cairns, in his testimony, why he made the disposition of the heritage general, is, that he had not at that time by him John Dalgleish's title deeds. The fact that the description of the two pieces of land, described in the letter of September 1808, hereinafter mentioned, is, nevertheless, nearly in the very same words as those which contain the description of two pieces of land described in the settlement of February 1808.—The fact that the settlement, the validity of which is in question, in this cause, bears date on the 2d February 1808, by which lands, and those two pieces

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of land are given, not to David, but to Robert Ballantyne.—The fact that the letter addressed by Robert Ballantyne to John Dalgleish, containing the obligation to grant the two pieces of land to David Ballantyne, does not bear date till September 1808, although the settlement bears date in February 1808, being more than seven months after the date of the settlement. To the circumstance that it seems to be totally unexplained for what reason no such letter was written until the month of September, although the settlement was executed in the previous month of February.—And to the circumstance, that it does not seem to appear how far John Dalgleish was or was not informed of what would have been the effect of the settlement of the month of February, in case his death had happened before the month of September. And it is further ordered, that after reviewing the said interlocutor, the said Court do decree and decern as to the Court shall seem meet.

For the Appellant, *W. Erskine, H. Cockburn.*

For the Respondent, *John Leach, Duncan Mathewson.*

NOTE.—Unreported in the Court of Session.

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STEEL v. STEEL, &c.

[Fac. Coll. Vol. xvii. p. 594.]

ROBERT GEORGE STEEL, Merchant, London, *Appellant;*

ROBERT STEEL, eldest son of the deceased Robert Steel, Merchant in London; JOHN MABERLY of Castle Street, Longacre, Westminster, Currier; and ALEXANDER DUNCAN, W.S., ... *Respondents.*

House of Lords, 18th and 24th June 1817.

ENTAIL—PROHIBITORY CLAUSE AGAINST SALES—"MEMBERS OF TAILZIE."—An entail contained a clause prohibiting "All or "any of the said heirs or members of tailzie, or their succes- "sors, to sell," &c. There was no express mention of the institute as included within this prohibitory clause, although from other clauses in the entail, it was contended that he was included. Held, that under the terms "all the heirs or mem- "bers of tailzie," the institute or disponee was not included, and, therefore, that he had right to sell the estate.

George Steel, the appellant's granduncle, made an entail of his estate, of this date, 6th March 1790, conceived in these

terms: "to and in favour of himself in liferent, for his life-"rent use only, and to George Steel, merchant in London, "his nephew, and Harriet Applin, his spouse, in conjunct "fee and liferent, and the heirs whatsoever of the body of "the said George Steel in fee, whom failing, to his own "nearest heirs and assignees whatsoever."

The deed of entail was recorded during the entailer's life. He died a few months thereafter, on 24th June 1790.

George Steel and Harriet Applin, the conjunct fiars in this entail, made up titles to the estate under the entail. A crown charter, which proceeded on the procuratory of resignation in the deed of entail, was expede in their favour, which contained all the conditions, provisions, and irritances of the entail verbatim engrossed, and infeftment followed thereon, in their names, and was recorded.

In this entail there was this prohibitory clause: "*Quinto*, "That it shall not be in the power of all or any of the said "*heirs or members of tailzie*, or their successors, to *sell, dis-*"*pone*, wadset, or impignorate, all or any part of the lands "or estate before mentioned, nor to grant bonds or infeft-"ments of annual rent or annuity furth of the same, or any "other right redeemable or irredeemable," &c. "*all which* "*debts, acts, and deeds are hereby declared void, in so far as* "*they may affect all or any part of the said estate.*" The sixth clause provided an annuity to Anne Applin. The seventh clause set forth, "That the whole *heirs and members* "*of tailzie above-mentioned*, and their heirs and successors, "who shall happen to succeed to the said lands and estate, shall "become bound, as by their acceptation hereof they become "bound and obliged to perform, and observe every one of the "different clauses and articles before mentioned. Declaring "always, as it is hereby expressly provided and declared, that "in case all or any of them shall contravene, and do on the "contrary hereof, or of any of the conditions, provisions, and "obligations before specified, or omit and neglect the fulfilling "and observing the same, such person or persons shall," &c.

George Steel, the nephew, afterwards was advised he could sell the estate, as he was the institute, and the fetters in the entail were not made to apply to the institute in express terms. Accordingly, he and his wife granted a trust-disposition to trustees, for the purpose *inter alia*, of selling the estate.

The estate was, accordingly, sold by public auction, without success, but was afterwards sold by private sale.

Nineteen years after it was sold, the present action of reduc-

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tion of the trust-deed, as well as subsequent sales of the estate was brought, calling the trustees and the several purchasers.

The Lord Ordinary (Balgray) after having disposed of some dilatory defences, pronounced this interlocutor: "The "Lord Ordinary having considered the memorial for Robert George Steel, pursuer, with the counter memorial for Robert "Steel and others, defenders, and whole particulars: Finds, "1st, That, in 1790, George Steel disponed his lands of "Baldastard to and in favour of himself in liferent, for his "liferent use only; and to George Steel, his nephew, and "Harriet Applin, his spouse, in conjunct fee and liferent," &c., "whereby the said George Steel, junior, became dis-"ponee or institute under the said deed; 2d, Finds that "the procuratory of resignation was granted in terms agree-"ably to the above dispositive clause; but declared to be "also under the conditions, provisions," &c., "which are ap-"pointed to be inserted in the charters, sasines," &c., "of "the foresaid lands, in all time coming, and to be observed "by all my heirs and substitutes above-named," &c., "3dly, "Finds, that by the fifth clause of the entail, it is declared, "that it shall not be in the power of all or any of the said "heirs or members of tailzie, or other successors, to sell, dis-"pone, wadset," &c., "and the irritant clause following this "prohibitory clause is directed against all debts, acts, and "deeds of all or any of the said heirs of tailzie and substitu-"tion, or their heirs. 4thly, Finds, that in the sixth clause "of the entail, where an annuity is granted to Anne Applin, "the foresaid George Steel and Harriet Applin, his spouse, "is contra-distinguished to the other heirs and members of "tailzie. 5thly, Finds, that under these circumstances, the "expressions in the entail, 'heirs or members,' and of 'heirs "'and members' of tailzie, cannot be held to apply to "George Steel, the disponee or institute; but that the ex-"pressions, 'heirs or members,' or 'heirs and members,' must "be held as synonymous terms; and, therefore, finds, that "the said George Steel had the power to sell the said lands "in the manner which he did in 1791, and that, in conse-"quence of the principles acknowledged in the case of Dun-"treath and Wellwood, and other decisions of the Court, "the prohibitions against selling or executing other deeds "contained in the foresaid entail, cannot be held as applicable "to the said George Steel, as institute or disponee; therefore, "assoilzies the said defenders from the present action, and "decerns; and in respect, that the case has been ably and

"fully discussed in the memorials, and, that it is a question, "proper for the consideration of the whole Court, dispenses "with any representation, but supersedes extract till the "first box day in the ensuing vacation."

On two several reclaiming petitions to the Court their Lordships adhered.* Jan. 14, 1814.

Against these interlocutors the present appeal was brought to the house of Lords by the pursuer (appellant.)

Pleaded for the Appellant.—The disposition which, along with the various subsequent transmissions of the estate, it is the object of the present action to set aside, was an act in direct contravention of the entail under which George Steel, the disponer, held the estate. To constitute a contravention, it is necessary, *first*, that the act should be of the description struck at by the prohibitory, irritant, and resolutive clauses;

Opinions of the Judges:—

* Lord Succoth.—"The interlocutor I think right. The heirs or members of tailzie must be held as synonymous, considering how they are used throughout the deed. The institute might have been included under the words, '*members of tailzie*,' but the question is, Whether that is the case in this instance?

"These words occur in some of the clauses of the entail and *not in others*. They are not to be found in some of the most natural clauses, particularly in the irritant clause, so that no irritancy is imposed upon the institute, supposing the words 'members of tailzie,' to include him.

"This is most natural. The main prohibition against altering the order of succession is also directed against the *heirs*.

"But the sixth clause, which relates to an annuity to Anne Applin, is the strongest; the institutes are distinguished from the *heirs*, by being named, and yet the words, and 'members of tailzie' are applied to the heirs. It is to no purpose, that the expression 'other heirs' of entail occurred, for these occur in the case of Duntreath.

"The cases quoted in the petition are strong, except, perhaps, that of Syme *v.* Ronaldson Dickson. But there the prohibitions against alienating, selling, &c., are directed against the *institute* by *name*, 'John Ronaldson, *my son*.' *Vide ante*, vol. iv. p. 471.

"The irritant clause again says, 'in case my said son,' or any 'of the heirs of entail, shall,' &c., and the resolutive uses the words, 'but also the *person* or *persons* heirs of tailzie foresaid.' Here the words *person* foresaid was held to mean the institute specially mentioned in the irritant clause with which it was connected." The other judges concurred on the grounds stated in the Lord Ordinary's interlocutor.

Campbell's Collection of Session Papers.

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and, *secondly*, that the person by whom it was committed, should be subject to the operation of those clauses. Here both requisites concur. The deed which it is the appellant's object to declare an irritancy and to reduce, is a conveyance, by which George Steel "gave, granted, assigned, and dis-"poned," the entailed estate to certain trustees, with powers to sell, which powers they actually exercised. By the fifth clause of the entail, it is declared, "That it shall not be in "the power of all or any of the said *heirs or members of tailzie*, "or their successors to sell, dispone, wadset, or impignorate, "all or any part of the said estate before mentioned, nor to "grant bonds," &c., "*all which* debts, acts, and deeds, are "hereby declared void, in so far as they may affect all or any "part of the said estate." The resolutive clause was in these terms, "Septimo, *That the whole heirs and members of tailzie* "*above mentioned*, and their heirs and successors, who shall "happen to succeed to the said lands and estate, shall become "bound as by acceptation hereof, they become bound and "obliged to perform and observe *every one* of the different "clauses and articles before mentioned. Declaring always, "as it is hereby expressly provided and declared, *That in* "*case all or any of them shall contravene and do on the con-*"*trary hereof, or of any of the conditions, provisions, and obli-*"*gations before specified, or omit and neglect the fulfilling and* "*observing the same*, such persons so contravening shall," &c.

The entail therefore contains prohibitory, irritant, and resolutive clauses applicable to the act of disponing committed by George Steel; and these clauses are directed, not only against HEIRS, but against the HEIRS AND MEMBERS OF TAILZIE—a general description which must reach George Steel. No doubt, the respondents say, that though the acts of disponing were sufficiently struck at by the entail, yet, George Steel being institute, was not subject to their operation, and refer to the Duntreath and other cases. But the slightest consideration of the terms of the restrictive clauses of the entail of Baldastard, is sufficient to show, that the question really in dispute here, is totally different from that which occupied the attention of the Court, in the cases cited by the respondents of Edmonstone of Duntreath, Gordon *v.* Gordonstone, &c. The present case is entirely new, and the decision now under appeal, if not reversed, will extend its operation far beyond any of those which have preceded it.

Pleaded for the Respondents.—The sole ground on which the appellant attempts to distinguish the present case from the

numerous cases which have been decided, both by the Court of Session and your Lordships, settling the law that fetters imposed on the heirs of tailzie *only*, do not affect the institute, fiar, or disponee, is, that in some of the clauses of the entail of the estate of Baldastard, the conditions are not imposed upon the heirs simply, but upon the heirs and *members of tailzie*, and though he cannot contend that George Steel, the institute, was an heir of tailzie, yet he contends he was a member of tailzie. But a *member of tailzie* can only be one upon whom the fetters of the entail are imposed; and to say, that George Steel, the institute, was a member, is just begging the question. When, the appellant argues that the entailer, by making use of that word, discovers his intention to include the institute, though he has not described him technically, or by name, he attempts to overturn the doctrine laid down in all the cases decided for the last seventy years. In the present case, it is submitted to be perfectly clear, that the resolutive clause is directed solely against the heirs of entail; the occasional addition of the words, "or members," or "and "members," is so employed as to show it is merely redundant, having no stronger meaning than the term "heirs of "tailzie," when used by itself. The exception from the prohibition to contract debt, of powers for providing for wives and children, given to the *heirs alone*, makes it quite evident that the prohibition was not meant to apply to the institute, who would otherwise, though the favourite person, have had no power to make any provision for his wife and younger children. If it is not admitted, that the words "*members of tailzie*" are merely synonymous with the words "*heirs of tailzie*," then it must be maintained, that the resolutive clause applies both to the institute and heirs, yet the heirs only have a power of providing their wives and younger children. But this construction is totally inadmissible. These terms must be taken as synonymous, and both of them to be distinguished from the institute; this distinction being made in the entail itself; for, by the sixth condition in the prohibitory clause, when he means to lay a burden or fetter on the *institute*, he does so, in this clause, by laying the condition on the *institute specially by name.*

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"As to the particular circumstance here that the purchase was

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made in trust, for one of the trustees to sell, that is not made a ground of proceeding in the case, and I give no opinion upon the case, in that view of it; and then the question depends solely on the entail.

"The Duntreath case has settled the point that entails are *strictissimi juris*, and that, whatever the intention of an entailer may be, fetters are not to be imposed by implication, and it is to be lamented that, after that point had been so settled in the Duntreath and other cases, a deed of entail, framed in 1790, should still have been made, so as to leave the matter in this situation, that, although a doubt can hardly be entertained that the entailer intended to include the institute or disponee, the intent has not been clearly and unequivocally expressed.

"With respect to that case of Duntreath, I have only two observations to make, 1st, That I was not a little startled at that decision; and 2d, That the decision having been once made, it must not now be shaken. But it is a very remarkable circumstance, that in the entail Act 1685, there is no word under which the institute can be fettered at all, unless under the words '*heirs* of 'tailzie;' and yet it has been decided, that if you fetter the *heir* only, in the prohibitory, irritant, and resolutive clauses; if in any of these clauses the word *heir* only is mentioned, the institute is not included in the fetters of the entail; and the question now is, whether the institute is fettered as a *member* of tailzie.

"Now, after it has been so often decided that the institute or disponee cannot be fettered by implication, that principle having been once solemnly settled, it ought not now to be got rid of by nice, thin, and shadowy distinctions. Having regard, then, to that principle, and to what, as Lord Kenyon expressed it, is to be found within the four corners of the instrument, we are to consider whether, if the entail intended to fetter the institute, he has clearly and unequivocally expressed that intention.

"The interlocutor of the Lord Ordinary was this. (Here his Lordship read the Lord Ordinary's interlocutor.)

"There your Lordships observe the words are '*all my heirs and* '*substitutes*,' and though I do not say that an institute may not be included in the words *members* of tailzie; yet it must be clear that the entailer so intended it, and there he uses the words '*heirs* '*and substitutes*,' which has a tendency to show that he had in view in this instrument, his heirs and substitutes only. '3d, Finds 'that, by the fifth clause of the entail, it is declared, that it shall 'not be in the power of all or any of the said heirs or members 'of tailzie, or other successors, to sell dispone, wadset, &c., and 'the irritant clause following this prohibitory clause is directed 'against all debts, acts, and deeds of all or any of the said heirs 'of tailzie and substitution, or their heirs.' Now, it was very ably contended at the bar, and in a manner which might carry

conviction to my mind, if I had not been obliged to guard it by rules of law, and to give a judicial opinion, that the entailer meant that these prohibitions should extend not merely to the substitutes, but also to the institute; but I cannot, in this instance, apply that construction; for, when the entailer says, 'that it shall 'not be in the power of all or any of the *said* heirs or members 'of tailzie,' &c., he seems to give the construction which he intended should be put upon these words, by the words which he uses in the previous part of the deed. '4th, Finds, that in the 'sixth clause of the entail, where an annuity is granted to Anne 'Applin, the aforesaid George Steel and Harriet Applin, his 'spouse, is contradistinguished to the other heirs and members 'of tailzie.' There George Steel is named in contradistinction to other heirs and members; and as to the word *other*, that form of expression occurred, and was argued upon in the Duntreath case, but the argument did not then prevail. '5th, Finds that, 'under these circumstances, the expressions in the entail of "heirs '"or members," and of "heirs and members" of tailzie, cannot 'be held to apply to George Steel, the disponee or institute; but 'that the expressions "heirs or members," or "heirs and members," 'must be held as synonymous terms" (that is, with *heirs* and *substitutes* mentioned in the first part of the deed) 'and, therefore, 'that in consequence of the principles acknowledged in the cases 'of Duntreath and Wellwood, and other decisions of the Court, 'the prohibition against selling or executing other deeds con-'tained in the foresaid entail, cannot be held as applicable to the 'said George Steel as institute or disponee,' &c.

"Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result. I propose, therefore, to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and adverting also to the whole of the circumstances as they appear in this instrument (I am anxious to have these words introduced) the word *members*, as used in this deed, does not include the institute, and that the judgment should be affirmed."

Journals of the House of Lords.

It was ordered and adjudged that, under the particular circumstances mentioned in the said interlocutor of the 6th July 1813, and adverting to the whole contents of the deed of entail, the effect whereof is in question, the several interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *John Leach, John Clerk, Geo. Cranstoun.*
For the Respondents, *Sir Saml. Romilly, Fra. Horner.*

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M'DOUALL v. BUCHAN.

ANDREW M'DOUALL, Esq. of Logan, . *Appellant;*

JOHN BUCHAN, Esq., W.S., ... *Respondent.*

House of Lords, 2d July 1817.

FACTOR—LIABILITY FOR NEGLECT—RATE OF INTEREST.—The respondent, it was alleged, acted as a factor for the appellant, but it did not appear that he held any written factory. He had allowed the tenants on the estate to fall into arrear of their rents, and did not avail himself of the hypothec to which the landlord looked for payment, and did not render his accounts regularly. Held him not liable for the whole arrears. (2) Interest was charged against him at the rate of three per cent. by the accountant, while the appellant sought to make him liable in the legal rate of interest. This was disallowed. Affirmed on appeal.

This was an action raised by the appellant's predecessor against the respondent, who had acted, for many years, as factor on the appellant's estates, to account for his intromissions, in which the chief question was, whether, in this accounting, the factor was liable to make good certain arrears of rents of farms, which, it was alleged, the factor ought to have recovered, had he used due diligence in availing himself of the hypothec belonging to the landlord. The appellant contended, that in the accounting he was not entitled to take credit for these arrears, but must be held liable for them in consequence of his neglect to recover the same.

It appeared from the appellant's statement, that the respondent had neglected to render periodically his accounts, so that he was thus prevented from being made aware of these arrears of rents.

On the other hand, it was stated, that the respondent was a relation of the appellant's family, and had all along been dealt with on that footing, and it was chiefly the appellant's father's own fault that regular accounts were not asked and given in. He also stated, that he was employed as a cashier, conveyancer, and as law-agent in the Court of Session, in conducting law suits there, purchasing lands, borrowing and lending money, &c. But the respondent did not occupy himself in the office of factor. He had held at first a factory, but this had been withdrawn, and at no time had he held a written factory or commission.

In these circumstances, the respondent admitted a balance in his hands of £700. The Lord Ordinary, Glenlee, remitted the accounts, when lodged, to an accountant.

The arrears of rents falling under the above description, for which the appellant sought that Mr Buchan should be made liable, amounted to £1179, 16s. 6d. The accountant reported, that Mr Buchan was liable in £906, 1s. 6d. of arrears, if these should not be recovered by the subsequent factor.

The accountant also, only allowed interest on these arrears, at the rate of three per cent., while the appellant contended, that he was liable on the whole arrears, and to the legal rate of interest at five per cent., for culpable neglect in the performance of his duty.

Objections were, therefore, given in to the accountant's report, but the Court, on report of Lord Glenlee, pronounced June 16, 1812. this interlocutor: "Repel the objections to the report, and "remit to the Lord Ordinary to proceed accordingly; it "being always understood, that the defender (respondent) is "to warrant the pursuer and his heirs against any demand "that may happen to be made upon them, founded upon "the bond which was granted for the price of Blairs, and "to relieve them of such demand if made." On reclaiming petition the Court adhered. Feb. 17, 1813.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant pleaded, that the respondent was liable as factor, because, in that character, it was his duty to have taken measures to secure payment of these arrears of rents, and to make the hypothec available.

Pleaded for the Respondent.—Even an ordinary factor, managing a land estate, is not liable as surety for the rents of the tenants or farmers on that estate. Without special instructions, he has no power to sell their effects under legal execution, or to imprison their persons. There is no rule in the law of Scotland, by which factors are bound to make effectual landlords' hypothec, under penalty of being liable themselves for the rent. But, in this case, the respondent was not in the situation of an ordinary factor. He held no written factory or commission; and another person, Mr Caddell, had just as much power to interfere with the tenants as the respondent.

After hearing counsel,

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THE LORD CHANCELLOR said, after stating the case,

" My Lords,

" The items are many in number, which rendered it necessary to take some time to examine them with attention. I have done so, and it is my humble advice, that the judgment should be affirmed, for, under the particular circumstances of the present case, I think Buchan is not answerable, as he would have been, if he had been acting strictly in the character of factor, and had not, on the contrary, been acting on principles which displaced the obligation that would have attached to him by the general principles of law, as applicable to factors.

" But it was insisted also, that this judgment should be affirmed with costs. I cannot, however, concur in that; for, though the just demands against Buchan were less than the claims insisted upon by the other party, yet, from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced, and the contest has, in some measure, arisen from his failure in that duty. I propose, therefore, that the judgment be affirmed, but without costs."

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, John Greenshields.*

For the Respondents, *Alex. Maconochie, Robt. Forsyth.*

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DUFF v. BROWN, &c.

HUGH ROBERT DUFF Esq. of Muirtown, *Appellant;*

ROBERT BROWN, Factor for Ronald George Macdonald, Esq. of Clanronald, and JOHN MACDONALD, Esq. of Borrodale, . *Respondents.*

House of Lords, 11th July 1817.

SALE OF GROWING WOOD—DELIVERY—RELIEF AND DAMAGES.—The appellant sold the growing wood on his lands of Almie to Mr Buchanan, and that right was transferred to the respondent, Brown. The appellant, from the correspondence which passed, understood that the wood was either cut, or in the course of being cut and taken away, and a bill was granted for the price, and paid. Three years thereafter, he sold the lands of Almie, with the wood growing thereon. It then turned out that the wood sold to Buchanan, and afterwards to Brown, was still on the lands uncut. In an action of relief and damages brought by Brown against the appellant, and the purchaser of the lands,

held the appellant liable in the value paid for the wood. In the House of Lords this was reversed, and it was declared that, according to the true meaning of the contract of sale of the wood, the wood was to be cut down in the course of that season, and that the whole dispute had arisen from Brown not having done so, and that, therefore, he had no right to demand damages against the appellant. And, further, that the purchaser of the lands having had notice of the sale, he must be considered as having purchased, subject to the burden of the contract of sale of the wood to Brown.

In the year 1801 or beginning of 1802, the appellant sold to Mr Macdonald Buchanan, the then growth or crop of the wood of Almie and estate of Rhetland, situated at a considerable distance from the appellant's estate of Muirtown, for the sum of £60 sterling. The wood was understood to be ready for cutting. No particular day or week was fixed for cutting the wood; but it was well understood, as in such cases it always is, that the purchaser should cut and remove the wood without undue delay, and, of course, before the end of the ensuing season. It was stated, that the appellant had a material interest that this should be the case, in order that a new growth might be advancing.

Mr Macdonald Buchanan transferred his interest in the wood to the respondent, Robert Brown, and this gentleman took possession of the wood. In a representation in the cause, he stated that "as soon as the bargain was concluded, "the representer entered into an agreement with Angus "Macdonald of Kinchreggan, the tacksman of the lands, "relative to the loss which he behoved to sustain by the "cutting down and removal of the wood; he then divided "it into such lots as appeared most eligible, and appointed "an overseer, to whom he committed the charge and sale of "the wood."

The appellant having been informed of the transfer of the wood to Brown, wrote to him the following letter:—"*Muir-*"*town*, 16*th May* 1802,—Sir, I am informed that my wood "of Almie has been made over to you by Mr Macdonald "Buchanan, at £60 sterling, and that the wood is *either now* "*cutting* or cut down. I beg to be informed when and how "the price is to be settled."

In consequence of this communication, Mr Brown allowed a bill to be drawn upon him for the price of the wood, by the appellant's factor, this bill expressly stating the sum, "as "the value of wood received from Hugh Robert Duff of

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"Muirtown." It was payable in the month of August following, and was retired by Mr Brown, without attempting to undeceive the appellant, as to the belief which he had expressed in the above letter, namely, that the wood was "either now cutting or cut down."

The lands of Rhetland, as already mentioned, were at a great distance from the appellant's residence. The estate of Mr Macdonald of Borrodale, is contiguous to Rhetland; he resides on his estate, and he could not fail to know everything about these lands.

It was about two or three years after the price of the wood was paid, and, as he believed the wood cut down, that, in 1804, Mr Macdonald proposed to purchase the estate of Rhetland, and wrote to Inverness, to Mr Macdonald, his agent there, to conclude the bargain for him. At this time, and before the bargain for the sale was concluded, Mr Macdonald knew that the wood of Almie was sold three years before. He wrote to his agent stating expressly this fact; and, although Mr Macdonald obstinately refused to produce this letter, he stated, in his deposition, that this was the fact.

The sale then was concluded through his agent. The sale conveyed to the other respondent, Mr Macdonald, "all and whole the penny land of Almie, &c., with the wood "park of Almie, and wood growing thereon."

In an action at Mr Brown's instance for relief and damages before the sheriff, it was decided that the wood belonged to Mr Macdonald, and he was, therefore, assoilzied; but Mr Duff not appearing, decree in absence went against him. On a charge on this decree, a suspension was brought, and an advocation also brought as to Mr Macdonald.

In regard to the wood sold to Mr Brown, it appeared that Brown had cut part of it only, delaying to cut down the greater part of it, in order to increase its value; and when, in February 1805, he came forward, after the sale to Macdonald, to take away the wood, the latter stopped him, and thus, the respondent, Brown, came back on the seller (appellant.) The question was, whether the appellant having conveyed to Mr Macdonald, along with Rhetland, the wood park of Almie and the *wood growing thereon*, he must be held to have conveyed only the young crop, on the supposition that the young wood was three years advanced in growth, or whether the old wood, which he had sold, and had supposed to have been all cut down three years before,

but which, for the greater part, was still on the ground uncut, must be held to have been conveyed to him? It was argued, that if a proprietor of lands concludes a contract for the sale of uncut timber, and if he afterwards, while the wood is still standing, sells the land to a third party, without qualification, the previous sale of the timber, which, till separated, is *pars soli*, does not affect the purchaser of the lands, if he is in *bona fide*, because such a contract is not a real right, and onerous purchasers are affected only by real rights. But here the appellant had, in express terms, sold the growing wood with the lands.

After a variety of procedure and interlocutors pronounced, the Court finally came to adhere to the Lord Ordinary's interlocutor, finding the respondent Brown entitled to damages to the extent of the sum or price paid for the timber, and decerned against the appellant therefor, and for expenses.

Dec. 12, 1811.
Jan. 21, 1812.
Feb. 18, 1812.
June 16, 1812.
May 25, 1813.
June 18, 1813.
Feb. 18, 1814.

Against these interlocutors the present appeal was brought by the appellant to the House of Lords.

Pleaded for the Appellant.—1, When a seller has delivered the subject of sale to a purchaser, the latter having attained possession, is entitled and bound to support his own right of property. If a third party molests him in the possession, and attempts to deprive him of the subject sold, he is not entitled to abandon it, and recur on the seller for repayment of the price, or for damages. Now, the wood which the appellant sold to Mr Macdonald Buchanan, and which was transferred by him to Mr Brown, was delivered to, and in the possession of the latter for years, before the appellant had any transaction with Mr Macdonald of Borrodale. This is proved by his own judicial admission, that as soon as the bargain was concluded, he entered into an agreement with the tenant of the lands in regard to the cutting down and removal of the wood. He divided it into the most eligible lots for sale, and he appointed an overseer, to whom he committed the charge and sale of the wood. He also admitted that he sold some of it. These admissions showed that Mr Brown had got possession so early as 1802. The letter of 16th May 1802, where the appellant stated that the wood was "either now cutting or cut," was left unanswered, and he never undeceived him on that point, but granted bills for the price.

2. Even though it were doubtful whether there had been complete delivery to, and possession by Mr Brown, before the transaction with Mr Macdonald and the appellant, and it

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could be held that Mr Macdonald had a right to the wood preferably to that of Mr Brown; the appellant conceives that still Mr Brown would have no legitimate ground of action against him. These assumptions imply that the appellant had not completely fulfilled his part of the contract, by which he sold the wood, but he submits it to be clear, that if a party, in a mutual contract, is rendered unable to fulfil his obligation, through the *culpa* of the other party, the latter is not entitled to claim performance, or damages in lieu of performance. Now, the inability of the appellant to implement his bargain with Mr Brown, evidently arose from the *culpa* of that gentleman. In the beginning of 1802, he sold a crop of wood, and in practice it is known, that though no term be fixed for cutting or removing the wood, the purchaser is bound to do so in the course of the ensuing season. From the nature of the thing, he cannot be allowed to let the wood remain uncut for years. He was, therefore, to blame in not cutting down and removing the wood. He alone was in *culpa*, in not performing this part of his contract; and, therefore, he ought to be held to stand to, and not to be relieved from, the consequence of his own wrong.

3. Although Mr Brown were entitled to maintain this action against the appellant for damages and repetition of the price, the appellant is entitled to be relieved by Mr Macdonald. It is plain that he could not mean to sell to Mr Macdonald the wood which, he believed, had been long ago cut and carried away by Mr Brown. In this belief he sold to Mr Macdonald the lands of Rhetland, "with the wood "park of Almie, and wood growing thereon." These terms are, no doubt, susceptible of two meanings, for they may be understood to mean either the wood which had been previously sold to Mr Brown, or the new growth since going on; but in relation to the appellant and the whole circumstances of the case, they could have only one meaning, namely, that they meant the young wood growing up since the sale. But Mr Macdonald and his agent must have understood these terms in the same sense. It is proved by Mr Macdonald's oath, that he had heard of the sale of the wood about the time when it took place. It is proved by his agent's oath, that when the negociation for the purchase of the lands was going on, his constituent informed him by a letter, that "he "(Borrodale) understood that the woods on the lands of "Almie had sometime before been sold by the pursuer." That letter has been improperly withheld by Mr Macdonald.

But, taking the fact as established by the depositions, it is proved that Mr Macdonald understood that the cutting of the wood had been previously sold. He made no objection to the bargain on this account; he required no explanation. He took the conveyance in the terms before mentioned; and, it is evident, that he must have understood these terms precisely in the same sense as the appellant used them.

Pleaded for the Respondent, Robert Brown.—1st, The respondent purchased from the appellant the timber of the wood of Almie, and paid to him the price of £60. By the act of the appellant, in selling the same wood to Mr Macdonald of Borrodale, the respondent was deprived of the timber which he had so purchased and paid for. The interlocutors appealed from merely find the respondent entitled to damages restricted to the price paid. The respondent was not restricted to any time in cutting down the wood, and there was no stipulation to that effect. Besides, he was never required to remove the timber, and had no reason to suppose that the delay in doing so would be objected to. When the appellant sold his lands to Mr Macdonald, he was bound to know the state of them, and no Court can be required to believe that when he sold the growing timber on his own lands, he did not know of what that timber consisted.

2d, The appellant has received the price of the wood twice. He sold it to the respondent, and received the price of it. He again sold it to Mr Macdonald, and received the price of it. And, therefore, he must repay the price to the respondent.

Pleaded for the Respondent, Mr Macdonald.—Every onerous purchaser acquires the property as it stands at the time of the sale. The buyer has nothing to do with any private obligations or contracts which may have been entered into by the seller, and is in no case liable for them, unless he expressly engages to perform them. The lands here were sold "with the growing wood thereon," and the wood was paid for as well as the lands, and his title was a title to both.

After hearing counsel,

It was, therefore, declared by the Lords spiritual and temporal, in Parliament assembled, that it appears from the letter of the appellant *Duff* to the respondent *Brown*, of the 16th of May 1802, that the appellant understood, and that the respondent, Brown, was thereby informed that the appellant understood, that the wood in question

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was then either cutting, or cut down; and it further appears, that the respondent, Brown, allowed a bill to be drawn on him for the price of the wood, the said bill expressing the same to have been so drawn for value of wood received from the appellant, which bill was payable on the 7th of August 1802, and was retained by Brown, without any information given to the appellant, that the wood was not cut down; and that, according to the true meaning of the contract for the sale of such wood, as explained by such letter, and the payment of such bill, such wood was to be cut down in the course of that season; and the matters in dispute between the parties, have arisen in consequence of the respondent, Brown, not having cut the wood in that season, according to the terms of the contract under which he claims, and that, therefore, the respondent, Brown, has no right to demand damages against the appellant, in consequence of the said respondent having been interrupted by the respondent, Macdonald, in cutting the wood in the year 1805, after the sale of the land by the appellant to the respondent *Macdonald;* and it is further declared, that it appears from the examinations of the respondent, Macdonald, and of his agent, Alexander Macdonell, that he had notice of the contract of sale under which the respondent, *Brown*, claims, at the time of the contract of the respondent Macdonald, with the appellant, and, therefore, the respondent, Macdonald, must be considered as having purchased, subject to the burden of the contract for sale of the wood, if the respondent, *Brown*, was then entitled to claim the benefit of such contract, not having on his part executed the contract according to the true meaning thereof; and, therefore, it is ordered, that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of in the said appeal, and do therein as shall be just, having regard to the effect of these declarations.

For the Appellant, *Sir Sml. Romilly, John Greenshields, Fra. Horner.*

For the Respondent, Brown, *C. Warren, James Moncreiff.*

For the Respondent, Macdonald, *John A. Murray, W. G. Adam.*

NOTE.—Unreported in the Court of Session.—In the sale of

growing corn, growing trees, large trees cut down, and articles of great size, symbolical or constructive delivery has been held sufficient. Grant, 21st July 1758, M. 9561; 1 Bell's Com., p. 176. In England the same law prevails. Tansley *v.* Turner (Com. Pl.) 1835. 2 Bing. New series, p. 151.

In the Roman law *traditio longæ manus* was admitted. Dig lib. 41 tit, 2 de possess, L. 1, § 21. In France the rule is the same. "When a wood merchant, who has sold to me a great log of "wood lying in his own yard, gives me, in pointing it out, per- "mission to take it away when I please, this permission, which "he gives me, in pointing out the log, is regarded as delivery of "it. I am from that moment held to commence my possession "*oculis et affectu*, even before any one on my part set about the "removal of it."—Pothier's, *Traité du droit de Proprieté*, vol. iv., p. 419.

When an heir of entail in Scotland sells the wood upon his estate, and dies before it is cut, the purchaser's right ceases in consequence of the heir's death. Lord Cathcart *v.* Sir J. S. N. Shaw, 1 Fac. Coll. 193 (Bell's Com., p. 52). Affirmed on appeal, *vide ante*, vol. i., p. 622; Stewart *v.* Stewart, 25th June 1761, Mor. p. 5436; Veitch of Ellioch.

In the case as above reported, much discussion took place on the subject of the delivery of the wood, but ultimately it was decided on the special circumstances of the case.

[Dow., Vol. v., p. 247.]

WM. JOHNSTONE, Esq. of Lathrisk, . *Appellant;*

JOHN CHEAPE, Esq. of Rossie, and ANDREW THOMSON, Esq. of Kinloch, . . *Respondents.*

House of Lords 10th July 1817.

(Deepening Rossie Drain.)

DECREE-ARBITRAL—CORRUPTION, FALSEHOOD AND BRIBERY.—Held, that there were no circumstances stated here inferring corruption, falsehood, and bribery, to warrant the reduction of the decree-arbitral; and that any excess ought not to affect the validity of the decree-arbitral, farther than to rectify the said excess, leaving the decree-arbitral unimpeachable in all other respects.

This appeal has reference to the Rossie drain alluded to in the appeal which immediately follows this, and which belonged to the respondent, Mr Cheape.

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The respondent saw the advantage which the deepening of the Eden would have. It would give him an additional level, by means of which he would be enabled to deepen his drain, and draw off the whole water in Rossie Loch. He, therefore, proposed to the appellant, at a time when he was not acquainted with country matters, and had newly succeeded to his estate, that the deepening of the Rossie drain would be a benefit to both—the appellant's lands of Bowhouse Moss, of about sixty acres, skirting part of the drain.

Accordingly, a deed of submission was entered into in the same manner as had been done in regard to the deepening of the river Eden, between Mr Cheape on the one hand and the appellant on the other—the arbiter appointed being the other respondent, Mr Thomson. This submission bound them to deepen the drain, "and to keep the same redd and "clear, and in good order in all time thereafter, at our mutual "expense, which shall be proportioned according to the benefit "accruing therefrom to our respective properties," and the submission "empowers the arbiter to decide and determine "what proportion each of us shall pay of the expense of the "operations already executed upon the Rossie Drain," as well as "what is to be hereafter done."

Vide next Appeal.

After the submission was executed, the works were commenced, and the drain was deepened eighteen inches. When finished, the appellant heard that the arbiter was about to pronounce his award. The appellant applied to the arbiter to know if he was to communicate the notes of his opinion, and to allow parties to be heard upon the subject. The answer made was, that the arbiter meant to make no such communication.

It appeared, that the quantity of ground drained by means of the Rossie Drain, belonging to Mr Cheape, amounted to 300 acres, while the number of acres belonging to the appellant was only sixty.

There were several objections the appellant had to the items constituting the entire cost of the drain, but which the arbiter refused to give effect to. The entire expense cost £2105, 2s., and of this sum the appellant was decerned to pay £770, which was more than the due proportion estimated, according to the benefit derived by him from the drain.

On the other hand, it was proved, that the arbiter had been at much pains to satisfy himself with regard to the benefit which Captain Cheape and the appellant would derive from the operations on the drain, and weighed in his mind,

maturely, every circumstance connected with the matters submitted; and this led the arbiter to come to the conclusion, that no further proof was necessary.

But, by the submission, it appeared, that the matter of deepening the drain was confined "from the point where it "falls into the Eden, up to the march between our properties "at Bowhouse Moss." A very considerable portion of the Rossie Drain *extends beyond* the last-mentioned point; and Mr Cheape had included the expense of that part in the general account. Therefore, certain items of the account were for things done on the drain beyond the limits of the submission.

The appellant brought an action of reduction of the decree-arbitral, on the grounds of partiality, corruption, and interest, on the part of the arbiter. The respondent, Cheape, having caused a charge to be given on the decree-arbitral, a suspension was brought, and these two actions having been conjoined, the Lord Ordinary (Gillies) pronounced this interlocutor: "Having heard parties procurators in this action Dec. 17, 1813. "of reduction, and in the suspension conjoined therewith May 12, 1814. June 7, 1814. "in the reduction, repels the grounds and reasons of reduc- "tion, assoilzies the defenders, and decerns; and in the "suspension, finds the letters and charge orderly proceeded, "repels the reasons of suspension, and decerns." His Lordship afterwards refused two representations. On reclaiming petition to the First Division of the Court, they were pleased July 1, 1814. to adhere.*

Against these interlocutors the present appeal was brought to the House of Lords, the appellant pleading nearly the same reasons as in the succeeding appeal.

After hearing counsel,

The Lords spiritual and temporal in Parliament assembled, Journals of the House of Lords.

Find, that the arbiter, in this case, had no authority, according to the terms of the submission, to decern or award, that the appellant should be charged with, or pay the following sums, or charges, or any of them, viz., "Two sums contained in the accounts of John Aitken "produced in the said cause, the one being the item," "To taking out the said stream," and amounting to £31; the other, "To clearing *Eden*, from thence up to

* The Court decided against the appellant, on the ground that no decree-arbitral is reducible, except on the ground of corruption, bribery, or falsehood.

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"the mouth of the Rossie Drain," amounting to £5; or with a charge in the account of Thomas Stewart, also produced in the said cause, for having been, as stated by him in his deposition made in the said cause, "employed with twelve workmen on the Eden, in bring-"ing up the level, as above mentioned, for about three "weeks" (three days out or in) "and that the wages he "paid to those workmen were 2s. 6d. per day each, he "being allowed 4s. per day," whatever such charge may be ascertained to amount to; but this finding is to be without prejudice to any right which any party or parties may be able to establish against the appellant in respect of such sums or charges in any other mode of proceeding: and find, that this excess in the decree-arbitral ought not to be taken to affect the validity of the decree arbitral, farther than to rectify the same with respect to the said excess as to the sums aforesaid; and it is ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to vary the interlocutors complained of in the said appeal, so far as it shall appear necessary to vary the same in consequence of this finding; and it is ordered, that the same be, and the same are hereby, affirmed in all other respects.

For the Appellant, *Saml. Romilly, Geo. Cranstoun.*

For the Respondents, *John Jardine, A. Clephane.*

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[Dow, vol. v. p. 247.]

WILLIAM JOHNSTONE, Esq. of Lathrisk, *Appellant;*

JOHN CHEAPE, Esq. of Rosse; JAMES BALFOUR WEMYSS, Esq. of Winthank; JAMES HERIOT, Esq., W.S.; HENRY BUIST, Esq. of Lindores, Tenant in Orkie, and ANDREW THOMSON, Esq. of Kinloch. *Respondents.*

House of Lords, 10th July 1817.

(Deepening the River Eden.)

DECREE-ARBITRAL—PROROGATION—ULTRA VIRES COMPROMISSI—CORRUPTION, FALSEHOOD AND BRIBERY.—In the reduction of a decree-arbitral. Held (1), that the decree was not inept from defect in the prorogation of the submission. (2). That the arbiter had exceeded his powers, in deciding matters not

within the submission, but that the decree was only impeachable, to the effect of rectifying the excess, and did not vitiate the decree-arbitral *in toto*. (3). That it was not a valid objection to the arbiter, that he had himself an interest in the matter.

The appellant's lands of Lathrisk are situated on the south side of the River Eden, in the County of Fife. The eastern boundary of these lands is a small brook called Browling Burn, which meets the Eden a little above the Kettle Bridge. On the north side a drain falls into the river, called the Rossie Drain, which was cut by Mr Cheape of Rossie, one of the respondents, for the purpose of draining a large sheet of water, called Rossie Loch, on his estate, on that side. The appellant has some property on the same side with the drain.

The appellant stated, that at a time when he had just quitted the army, and was unacquainted with the real affairs and interests of his estate, Mr Cheape had induced him and some other proprietors, to enter into a contract of submission, by which they empowered Andrew Thomson, Esq. of Kinloch, to get the Kettle Bridge removed, and a new one erected to the westward of that bridge, and the channel of the river Eden deepened and widened from the point where the said bridge stands, up to the point where Rossie Drain falls into the Eden. The appellant farther states, that Mr Cheape had represented that this deepening of the Eden would improve their lands on the one hand, and enable him more effectually to carry off the whole water from Rossie Loch, on his estate, through means of the Rossie drain, on the other.

The parties named Mr Thomson arbiter, to fix the proportion of expense, according "to the benefit which the lands "belonging to or possessed by each of us, will derive there-"from."

The operations were gone into; the arbiter fixed the proportion of expense falling on each; and pronounced his decree-arbitral.

The appellant stated that, having afterwards discovered that the operation of deepening the channel of the Eden, was of no benefit, at least of scarce any use to his estate, he declined to obtemper this decree-arbitral, and brought a suspension, and also an action of reduction to set aside the decree-arbitral, on the following grounds:—1st, That the decree-arbitral was null and void, and not binding on the pursuer, in respect, the term of the submission, in so far as he was concerned, had expired before it was pronounced.

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The submission was subscribed by him on the 11th March 1811; but the decreet-arbitral was not pronounced till the 11th day 1813. And, although it appears that the arbiter had subscribed two several minutes of prorogation, the first dated the 8th day of November 1811, and the other dated the 2d day of November 1812, yet these could be of no effect whatever, because the said decreet-arbitral proceeds upon a pretended submission amongst five parties, and these prorogations cannot apply to that submission, because at the date of the last of them, the submission had not been subscribed by two of these five gentlemen. 2d, The said decree-arbitral was *ultra vires compromissi*, in respect the arbiter thereby "decerns and ordains the said parties, or "such of them as have lands in property or possession opposite "to the said river, and their heirs and successors, to keep the "river and the banks thereof, now that the said improvements "are completed opposite to the lands belonging to or pos-"sessed by each of them within the above-mentioned points, "in good and sufficient condition and repair, in all time "coming, so that none of the lands belonging to, or possessed "by any of the parties in the submission, shall be injured by "neglecting such repairs otherwise; the arbiter decerns "and ordains the person or persons failing so to do, not only "to perform these stipulations, but also to pay whatever "damage may be sustained by any of the other parties in "consequence of such neglect, as the same may be ascertained, "by fit neutral men." And, because the matters thus determined by the arbiter, were not submitted to his decision, but were disposed of by an agreement or obligation amongst the parties themselves, which is recited in the said submission, and which is materially different in its import from the above quoted decerniture. 3d, That the said Andrew Thomson, in pronouncing the foresaid decree-arbitral, decided a matter in which he himself had a considerable interest. 4th, That there were strong reasons to believe, that in pronouncing this decree, the arbiter was influenced by corrupt motives, arising from the transactions or understanding between him and the said John Cheape, relative to the arbiter's own drain. 5th, That the decree-arbitral was grossly iniquitous, and that the arbiter acted with partiality. That he had refused to give him notes of his intended award. That he had refused to receive evidence that the appellant's lands derived little advantage from the operations, so as to show that the proportion of expense falling to him ought to be very small. Nor was

he allowed to examine the accounts and vouchers as to these operations.

The defences stated to this action were, 1st, That power having been given to the arbiter to prorogate the submission, from time to time, and as such prorogations were of course consented to by the pursuer's signature to the deed, it was *jus tertii* on his part, to state this as a reason of reduction.

2d, The pursuer (appellant) had the least reason of any of the parties to find fault with the clause here cited, which is inserted in the decreet-arbitral, as his lands and marl, being situated highest up, he derives the whole benefit of the measure, with a very trifling burden, and it is by no means clear that the powers given to the arbiter were not sufficiently ample for this purpose. If the Court shall be of opinion that they are not, then it is conceived that, although they may hold this clause *pro non scripto*, it does by no means follow that the decreet-arbitral should be reduced as to the other parts of the decerniture.

3d, The third reason of reduction above quoted, was well known to the pursuer, previous to his signing the submission.

4th, The well known character of the arbiter, is a sufficient answer to this action of reduction. In as far as regards John Cheape, he pointedly denies any such transaction or understanding as that alluded to by the pursuer.

5th, There is not the slightest reason for maintaining that the arbiter acted with partiality. He did not rely on his own judgment, he took the assistance and opinion, on all the operations, of men of skill; and he believed that the benefits to the appellant, in working an immense body of marl, yielding him £600 per annum, would not have been disputed. Besides, the arbiter heard all the facts condescended on by the appellant, although he did not think them of such a nature as to induce him to alter his judgment.

In apportioning the expense, it appeared that the arbiter found the total expense to be £759. Of this he apportioned £534 on the appellant; on Mr Cheape, £146; on Mr Wemyss, £43; on Mr Buist, £22, and on Mr Heriot, £13.

The appellant had contended that his lands, being further up the river, and there being a fall from these lands to the river of 300 feet, any operation below the mouth of the Rossie Drain, was perfectly useless to his lands, and, therefore, that not more than one-twelfth part of the expense ought to have been imposed on him.

The Lord Ordinary (Gillies) pronounced this interlocutor:

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—"Repels the reasons of reduction, sustains the defences, "assoilzies the defenders, and decerns." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The decree-arbitral is void, because the term of the submission had expired before it was pronounced. To perceive the force of this reason, it will be observed, that by the law of Scotland, "where the "day within which the arbiters are to decide, is left blank "in the submission, their powers of deciding, has been by "practice limited to a year." Erskine B. iv. T. 3, § 29. According to the same author, "this hath proceeded from the "words of the style, by which the arbiters are empowered to "determine against the day of next to come; "which clause, in what way soever the blanks shall be filled "up, cannot possibly reach beyond the year." In the present case, the day within which the arbiter is to decide, was left blank, but power was given him to prorogate or extend the period, if he saw cause, by an order to that effect. The clause in the submission is in these words:—"And whatever "the said arbiter shall decide and determine by decreet-"arbitral, to be pronounced by him betwixt the day "of , or between any further day to which this sub-"mission may be prorogated, and which he is hereby em-"powered to do at pleasure." If the arbiter, therefore, did not make an effectual order of prorogation within the year, the submission fell, and he had no power to pronounce an award afterwards. The submission was subscribed by the appellant, upon the 11th of March 1811, but the decree-arbitral was not pronounced till the 11th day of May 1813. It is true, the arbiter made two orders prorogating the submission, one upon the 8th November 1811, and the other upon the 2d November 1812; but these orders were ineffectual, because the submission bears to have been entered into by the five parties, namely, the appellant and the respondents, John Cheape, John Balfour Wemyss, James Heriot, and Henry Buist. But two of these parties, namely, James Heriot and John Balfour Wemyss, did not subscribe till a period subsequent to the date of the last order of prorogation. Till all the parties had subscribed, the arbiter had no power to make any order, and, therefore, these inept proceedings could not prolong the submission for more than a year.

2d. The award was *ultra vires* of the arbiter. He ordains the parties "to keep the river and the banks thereof in good "and sufficient repair." The parties agreed, by a contract among themselves, to keep the banks in repair by the submission, but they did not empower the arbiter to pronounce any decree to that effect; the award is, therefore, beyond the limits of the submission. Even if this order had been equitable, it would not have been obligatory, but it is most iniquitous. By the submission, the parties bind themselves "to "keep the said river and banks thereof, after the improve-"ments are completed, opposite to the lands belonging to, or "possessed by each, between the above mentioned points, "*and which are to be thereby benefited*, in a good and suffi-"cient condition and repair, in all time thereafter." But the arbiter omits altogether, in his award, the words, "and which "are to be thereby benefited," which forms one of the important conditions of the agreement.

The appellant's lands are opposite more than three-fourths of that part of the channel of the river which has been deepened, but the greatest part of these lands have derived no benefit whatever from the operation. According to the arbiter's award, however, the appellant must pay three-fourths of the expense of keeping the work in repair, when at least eleven-twelfths of the benefit is reaped by others.

3d. The appellant averred and offered to prove, both before the arbiter, and in the Court of Session, that if the expense of executing the work had been apportioned among the parties in the ratio of the benefit derived from it, he could not have been subjected in more than one-twelfth of the whole sum, or about £63, 5s. But the arbiter has found him liable in £534, which is considerably more than two-thirds of the whole sum. Both the arbiter and the Court refused to allow any proof upon the subject, though relevant to set aside the award.

4th. There was produced written evidence under the arbiter's own hand, that he had burdened the appellant with a much greater sum than that which, he was conscious, corresponded with the benefit which the appellant had received. It has been mentioned that the only part of the appellant's estate materially profited by the operation, is Easter Lathrisk. This is proved by a letter from the arbiter himself.

5th. The arbiter had an interest in the question, and therefore acted as a judge in his own cause, which is of itself sufficient to vitiate his award. He has a property called

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Broadmire, containing a bed of marl, the surface of which is drained by a drain conducted through part of Mr Cheape's property, and falling into Rossie Drain. The arbiter had other lands, called Monkmoss, which may also be drained by a cut to the Eden.

Pleaded for the Respondents.—1st. It is incompetent to bring the awards, or decrees-arbitral, under the review of the Court of Session by the Act 1695, except on the ground of corruption, bribery, or falsehood, in the arbiter. Here, from the known character of Mr Thomson, the arbiter, such accusations are not for a moment to be listened to, far less are they made out from any one single slip in the whole proceedings. In regard to the expiry of the submission, the appellant's argument proceeds on the assumption, that the submission was limited to one year, though with a power to the arbiter to prorogate. It is true, where the submission mentions no time within which the award must be given, it has been laid down as a rule, that the parties mean that it should be pronounced within twelve months. The common way in Scotland is, to say that the award shall be pronounced between the of next to come, which necessarily limits the time to the next twelve months; but, in the present case, the words, *next to come*, are omitted, and must have been purposely omitted, from the nature of the case. The operations were to begin immediately, but it was impossible to say precisely, when they would be finished, and consequently, when the arbiter could apportion the expense. The parties, then, could not intend a limitation which would throw every thing loose, and occasion a confusion inextricable, in case the arbiter neglected to prorogate, and the work was not completed within the year. Besides, it has been settled by decisions of the Court, that where the submission bears different dates, the twelve months shall be reckoned from the last date. And, therefore, the award, in this case, was, in any view, regular in that respect.

2d. That part of the decree-arbitral, which is said to be *ultra vires* of the arbiter, is merely copied from the obligation, where the parties expressly bound themselves to keep the works in repair, after they should have been completed. This part of the decree-arbitral may be superfluous and unnecessary, but surely it can afford no ground of reduction of the decreet-arbitral itself. A decreet-arbitral, containing a finding *ultra vires* may, nevertheless, be sustained, in so far as it is *intra fines compromissi*. Even, therefore, supposing the

Montgomery v. Strang, Lennox and Co., June 13, 1798. M. p. 631. Kid v. Patterson, June 19, 1810. Fac. Coll., vol. xv., p. 705.

decerniture of the arbiter as to keeping the works in repair to be *ultra vires*, this affords no ground for setting aside the other parts of the decreet-arbitral, which are confessedly comprehended under the submission.

3d. It is stated, that the arbiter decided a matter on which he himself had a considerable interest, and decided it in his own favour, inasmuch as a considerable time ago, the arbiter cut a drain running from his lands of Kinloch, passing through the property of the respondent, Mr Cheape, and falling into a great drain made by the latter, which empties itself into the Eden, and that in this way the arbiter derives considerable benefit by the operations on the Eden. But this, supposing it to be made out, cannot affect the award. All the parties had previously agreed about the operations in the Eden. The only thing, therefore, referred to the arbiter, was the proportion of expense each was to bear, and that was to be done according to the benefit each might derive. Mr Thomson had made no alteration on his drain since the operations on the Eden were begun, nor had he any occasion to do so, because, before this, he had a sufficient level, from the tail of the drain being considerably higher than the old bed of the Eden, at the point where the Rossie drain joins it.

4th. The arbiter, it has been also alleged, had shown partiality, because he had declined to show the notes of his opinion, and his evidence was refused. But, in these allegations, the arbiter had not shown gross partiality. He has shown even no discourtesy, far less partiality. Having satisfied his conscience, was the arbiter to admit evidence, which he was convinced could have no influence upon him? That he was not bound to do so, is a question that has been decided in the case of Kirkaldy.

Kirkaldy v. Dalgairns, June 16, 1809. Fac. Coll., vol. xv., p. 318.

After hearing counsel,

THE LORD CHANCELLOR said—(*Vide* Dow for speech).

The Lords spiritual and temporal, in Parliament assembled, find, That the arbiter, in so far as he "Decerned and "ordained the said parties, or such of them as have "lands, in property or possession, opposite to the said "river, and their heirs and successors, to keep the river "and the banks thereof, now that the said improvements "are completed, opposite to the lands belonging to, and "possessed by each of them within the above mentioned "points, in good and sufficient repair in all time coming,

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"so that none of the lands belonging to, or possessed by, "any of the parties in the submission, shall be injured "by neglecting such repairs, and decerns and ordains "the person or persons failing so to do, not only to per- "form these stipulations, but also to pay whatever "damage may be sustained by any of the other parties, "in consequence of such neglect, as the same may be "ascertained by fit neutral men," had no authority so to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decreet-arbitral. And it is further ordered, that with this finding, it is ordered and adjudged, that the cause be remitted back to the Court of Session, to vary the said interlocutors, so far as this finding may require the same to be varied. And it is ordered and adjudged that the said interlocutors, in all other respects be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun.*

For the Respondents, *John Jardine, And. Clephane.*

NOTE.—Unreported in the Court of Session.

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THE DUKE OF BUCCLEUGH v. MONTGOMERY, &c.

HIS GRACE THE DUKE OF BUCCLUEGH AND QUEENSBERRY, ... *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart., THOMAS COUTTS, Esq., Banker, London, WILLIAM MURRAY, Esq. of Henderland, and Others, Executors and Trust Disponees of the late Wm. Duke of Queensberry, ... *Respondents.*

House of Lords, 10th July 1817.

This case was remitted for re-consideration, and is fully reported under the second appeal, together with all the other appeals in the Queensberry and Neidpath entails, in 1819.

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THE DUKE OF BUCCLEUGH v. HYSLOP.

DUKE OF BUCCLEUGH AND QUEENSBERRY, *Appellant;*

JOHN HYSLOP, Tenant in Halscar, . . *Respondent.*

House of Lords, 10th July 1817.

This case was also remitted for reconsideration; and is reported in the second appeal, along with the whole other cases in the Neidpath and Queensberry entails, in 1819. *Vide infra.*

JOHN GORDON, Esq. of Cluny, . . *Appellant;*

JOHN MARJORIBANKS, FORBES HUNTER BLAIR, and WM. HAGGART, Esqs., Trustees for the New Club, . . } *Respondents.*

House of Lords, 18th February and 2d March 1818.

BUILDING PLAN—DEVIATION—CHARTER—NUISANCE.—Held (1.) That the respondents, proprietors of a house in St Andrew Square, were not prevented from erecting on their back area the buildings in question, by the original plan of the new town of Edinburgh. (2.) That they were not restrained, by their charter, from making such erections; and (3.) That the proprietors on each side of the respondents' property, had no right to restrain them either on the ground of nuisance, or on the ground of holding any servitude, legal or conventional, over them.

The district of the city of Edinburgh, which is called the New Town, was begun to be erected in the year 1767. The grounds on which this new city was proposed to be erected, belonged to the Corporation of Edinburgh, who caused a plan to be made, in which, as the appellant stated, the great object was, to avoid the inconveniences experienced in the Old Town, by the buildings being crowded together, and a free circulation of air thereby prevented. Spacious streets and squares were delineated, and the spaces or lots on which the buildings were to be erected, were marked on the plan by letters, to which reference was made, in the conveyances to the purchasers of the several lots. This plan was engraved and published in every way possible, and universally understood, as showing how the new buildings were to be carried on, and the open spaces left.

That which is now called St Andrew Square, was first built, and in the centre of it a considerable space was left railed in from the circumjacent street, which was to be common to all the proprietors of houses in the square. Divided from this area by the streets, were the grounds on which the

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houses were to be erected in a line, and behind each a certain space marked in the plan, as open or garden ground, extending to a back street or lane called the meuse.

Among the houses first erected on the south side of St Andrew Square, was one built by David Ross, Esq., and in the charter or conveyance of the ground by the Corporation to him, the property was thus described:—"All and whole "forty-two and a half feet, in form of area, letter N, lying "on south side of St Andrew Square, in the new extended "royalty of the city of Edinburgh," whereupon there was then erected a large lodging, which lodging or ground is bounded on the east by the Earl of Northesk's feu, on the west by the ground feued by Alexander Gray, Writer to the Signet, and now belonging to Cosmo Gordon, Esq., one of the Barons of Exchequer, on the south by the meuse lane, and on the north by the street, on the south side of said square, opposite to the said lot of ground. This lot and the house built upon it, was, a few years ago, purchased by a society of gentlemen, in number exceeding 300, calling themselves the New Club, the rights being taken in the names of the respondents in this cause, as trustees for the New Club.

Adjoining, on the west (as is above stated), is the lot on which Alexander Gray built a house, which came to be the property of Baron Gordon, and on his death descended to Charles Gordon, Esq. of Cluny, the father of the appellant, and it was thus described in the charter or conveyance by the Corporation:—"All and whole that piece of ground or area "upon the south side of the square now known by the name "of St Andrew Square, within the said extended royalty, "upon which the said Alexander Gray has now erected a "dwelling-house, four stories in height, containing fifteen "fire rooms besides a kitchen, garrets and cellars, within the "same; and has also built five cellars or vaults under the "pavement, in front of the sunk area of said building or "dwelling-house; and has likewise enclosed the back part of "the foresaid area, lying to the south of said house, and laid "out the same as a garden, which property is bounded," &c.

Between the back areas or garden ground of each of the properties, there was erected a common wall of separation.

At the bottom of the area or back ground of the property of Mr Ross (now the respondents), he erected a coach-house and stables. Whether he could do so, the appellant stated, might have been questioned, but as the height was moderate,

no objection was made by the adjoining proprietor at the time. Mr Baron Gordon, likewise built stabling, &c., but he did not encroach on the original area, purchasing ground further south for that purpose, on the opposite side of the meuse lane.

Mr Ross' property having been purchased by the Club, in 1809, they applied to the Dean of Guild (to whom the regulation of the buildings in the city appertains), "for leave to "erect certain works on the back area or garden, representing "that they had no intention of erecting either kitchens or "billiard-rooms, but that their buildings were to be confined "solely to a staircase and three water-closets, which, instead "of covering the whole of the garden, will not extend over "a tenth part; the roofs of which, as they were not to rise "above the level of the wall, could be attended with no pos-"sible inconvenience to any person; and there was no possible "danger of their emitting smoke of any description whatever." Leave was accordingly given.

It appearing, however, to the respondents, that other buildings than those enumerated in their application to the Dean of Guild, might be more to the convenience and advantage of the New Club, they presented a second application to the Dean of Guild, praying that instead of the buildings above-mentioned, they might be allowed to convert the stables which the original proprietor had erected at the bottom of the garden, into a kitchen and servants' rooms, and above these to build a billiard-room, warm baths with dressing-rooms, &c., and the present question regarded the right of the respondents to build these in the back area of the house, according to the plan in process.

The appellant's father appeared before the Dean of Guild, and opposed this application on the ground that the intended building was contrary to the original plan of the New Town of Edinburgh, and would be a nuisance.

The Dean of Guild pronounced this interlocutor:—"Repels Nov. 18, 1813.
"the objection that the use to which the proposed buildings
"are to be put, is of the nature of a nuisance: Finds, that
"when the ground on which the New Town is built was
"feued, a regular plan was laid down, in which the health
"and comfort of the inhabitants appears to have been con-
"sulted, by disposing of the back ground into areas for pro-
"motion of a free circulation of air, and adding beauty to
"the appearance, as well as affording convenience to the in-
"habitants, and from which plan no deviation ought to have
"been permitted. Finds, that in cases where any material

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" deviation from the general plan has taken place, the same " has either arisen from the consent of conterminous heritors, " or from not being opposed by the public or those having " interest therein, in proper time. Finds, however, that no " material deviation or inconvenience will arise from the pro- " posed change on the buildings belonging to the pursuers, " therefore, grants warrant to them to make the alterations " and additions craved, conform to the plan marked as relative " hereto, under the special exception and condition, that the " height of the passage to the proposed kitchen, billiard-room " and baths, does not exceed that of the garden or division " wall, and decerns."

The respondents presented a bill of advocation to the Court of Session, in so far as the interlocutor prevented them from raising the building which was to form the passage from the house through the garden to the proposed kitchen to the height they intended.

And Mr Gordon then presented also a bill of advocation so far as the interlocutor repelled the objection to the proposed buildings as a nuisance, and granted warrant to the respondents to make the alterations and additions craved.

The respondents contended that they were not prohibited, either by their title-deeds, or by the plan of the New Town of Edinburgh, from erecting the buildings in question; and that it was not a nuisance which the conterminous heritor is entitled to oppose. They further contended that the only restriction in the charter had reference to the space of ground in the middle of the square enclosed with rails; and that it further allowed the proprietor " to exercise any other act of " ownership, which may not be inconsistent with the manner " of holding hereby prescribed."

The Lord Ordinary (Alloway), reported the case to the First Division of the Court, who pronounced this interlocutor:

Mar. 10, 1814.

—" Find that they (respondents) are entitled to erect the " passage to their proposed kitchen, billiard-room and baths, " of the height and dimensions as said passage is delineated " in the plan in process, and decern accordingly; and in the " advocation at the instance of Charles Gordon, find, decern, " and declare in terms of the interlocutor of the Dean of " Guild: Find the said Charles Gordon liable in the expenses " of process; allow an account thereof to be lodged, and " remit the same, when lodged, to the auditor of Court to " tax and report."

At this time the appellant's father died, and he was sisted

as a party to the process, whereupon, and upon production of the account of expenses, and the report of the auditor thereon, they decerned against the appellant for the amount.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—It is contended, on the part of the respondents, that they are at liberty to erect any building on their property, or make any use of it they please, so far as not expressly restrained by the conditions of the original grant, and not inconsistent with the common law respecting nuisances which may be abated. But the appellant is entitled to assume, in terms of the sentence of the Dean of Guild, confirmed by the Court of Session, and not appealed from: "That when the ground on which the New "Town of Edinburgh is built was feued, a regular plan was "laid down, in which the health and comfort of the inhabi- "tants was consulted, by disposing of the back grounds into "areas for the promotion of a free circulation of air, and "adding beauty to the appearance, from which plan no "deviation ought to have been permitted; and when any "deviation has taken place, it has been by consent, or owing "to inadvertence." The respondents, therefore, are not at liberty to avail themselves of deviations which may have occurred in other instances, or to resort to general rules as to the use which may be made of unlimited property, if these could support their plea. The plan to which the Dean of Guild refers, is recognised in the charter to Mr Ross, in whose place the respondents now stand, granting to him the area marked by the letter N, which is unintelligible without the plan, and necessarily makes that plan a part of their title, as much as if, in fact, it had been annexed to the grant; and by that plan it is proved that the back areas of the buildings were to remain open as garden ground. The erection even of stables and coach houses is a violation of it, and can only be accounted for in the way the Dean of Guild does. Various cases have occurred, in which the Court of Session has enforced the adherence to the original plan, and restrained buildings contrary to it, and some of these cases are precisely analogous to the present. That certain restraints and conditions were imposed by the grant or charter, does not justify the inference that in all other cases the grantees were at liberty to make what use of their property they pleased, consistent with the general law. These conditions respected the tenure and the use of the main buildings only.

Riddell v. Moir, June 1808; M. Sy. "Property," No. 3, Note 1, Campbell v. Lindsay, Feb. 7, 1803, Fac. Coll., vol. xiii., p. 192; Lord Robertson v. Reid, M. Sy. "Property," No. 3, Note 2; Young and Co. v. Dewar, Nov. 17, 1814, Fac. Coll., vol. xviii., p. 23.

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2d, The Dean of Guild so far restrained the respondents as to confine the height of the proposed passages from the main house to the kitchen, billiard-room, baths, &c., to that of the common division wall between the properties of the appellant and respondents; but the decree appealed from allows these passages to be raised for a certain length, five feet or upwards above the wall, thereby overlooking the appellant's garden, and exhibiting an appearance of the ugliest kind. It is admitted that the respondents have no right to raise the wall itself, and the appellant submits, that neither have they any right to erect buildings any higher than it, to his injury and inconvenience, nor indeed to erect buildings of any kind on that part of the ground marked on the feuing plan, as a garden or flower-plot.

3d, The proposed buildings, and the use they are avowedly to be put to, must be a pernicious nuisance to the neighbourhood, and the appellant's premises in particular. The smoke and vapours from the kitchen of a tavern, and from the baths, &c., must be destructive of the comfort of the inhabitants of the appellant's house, and injurious to their health. The noise of the cooks, scullions, and servants, resorting and working in the kitchen and other apartments proposed, must be extremely troublesome, and it requires no proof what sort of neighbourhood billiard-rooms, filled by the members of the New Club after dinner, will make, when every word and every stroke may be heard in the adjoining garden.

4th, This case is not to be judged of by the rules respecting nuisances, defined by common law or general decisions. The Dean of Guild of Edinburgh, as in other burghs in Scotland, has a discretionary power to regulate buildings, &c., within the royalty, and is not tied down by any rule, but is to study the general good and convenience, *vide* Bankton, B. iv. tit. 26, § 2. The sentences of the Dean of Guild are no doubt subject to the review and control of the Court of Session, as the decrees of that Court are to the review and control of your Lordships' house. Your Lordships are, therefore, to judge of this case with the same latitude that the Dean of Guild had; and if you are satisfied that the permission which has been granted is improper, and that it must tend to the discomfort of the appellant and the vicinity, and be a bad precedent, it is of no consequence though a thousand instances are produced of the same things being done in other places, if sanctioned by every Court of the kingdom, when objected to. The real question here is, Whether it would be right or proper to

allow the New Town of Edinburgh to be crowded with buildings of all descriptions, as much as the Old Town was or is? Whether what was so universally complained of, and so noxious, understood to be happily avoided by the plan of the New Town, shall now be exhibited there, in all its deformity, and with all its bad consequences?

Pleaded for the Respondents.—On the charter. In deciding on the import of the charter, a court of law could not consider as unnecessary, any clause which, in any respect, tended to point out the powers conferred on the grantee, or the restrictions imposed on him by the charter. In the present case, the clauses quoted from the charter, show that, besides building houses on the front of their areas, the feuars, at the time of granting the charters, were supposed to have a right, not only to erect other buildings, but even to establish a brewery. But, further, the case does not rest merely on the charter containing no prohibition against building on the back areas; for it is evident from the charters of the parties, that wherever the Town intended to prevent buildings, this was done with the most anxious care. Accordingly, by a special clause in the charter, it is distinctly declared that it shall not be in the power of the feuars to do anything with the area of the square itself, or to convert it to any purpose whatever, except the use of the families themselves, for pleasure, health, or accommodation. By the charter in favour of Baron Gordon, there was conveyed to the Baron, not merely the house and area in St Andrew Square, but also a stable and coach-house, together with five feet of ground for a dunghill, lying upon the north side of an area in Princes Street, immediately opposite to the Baron's dwelling-house, and area in St Andrew Square, but the one charter or the other does not restrain the exercise of the full right of property in all other respects.

2d, Plan of the New Town. The appellant next stated that this erection was contrary to, and a deviation from, the plan of the New Town. But it is quite clear, 1st, In point of fact, that that plan was never intended to prevent or restrict the right of building in back areas; and 2d, In point of law, no restriction or obligation could be reared up against them by mere reference to a plan, without being inserted in their charter.

The appellant's father did not refer to any case, except the noted case of Deas *v.* Magistrates of Edinburgh, decided by this Most Honourable House. That case, however, was

Vide ante, vol. ii., p. 259.

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totally different from the present. As the appellant's father founded his objections to the respondents' operations chiefly on the plan of the New Town, and as he referred to the case of Deas, the respondents suppose the appellant will produce engravings of the plan on which he founds, and of the plan referred to by Lord Mansfield in deciding the case of Deas. The respondents aver that your Lordships, on inspecting the engravings of those two plans, will be satisfied of the difference between the present case and the case of Deas.

The case of Deas regarded ground in the front of Princes Street, which, in the plan exhibited to the different feuars, had been delineated and laid out as pleasure grounds; the north loch, then and still a nuisance, being represented in this plan in the agreeable form of a canal, with walks, terraces, and rows of trees, on each side.

As to the objection stated on the ground of nuisance, that is perfectly unmaintainable.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

" My Lords,*

" There is another cause which stands before your Lordships for judgment, and, as the attention of your Lordships is not at this moment engaged, with your permission, I will avail myself of this opportunity to state what has occurred to me upon the subject. It is the case of Gordon *v.* Majoribanks; it is, in truth, a cause between Mr Gordon and the members of the New Club at Edinburgh. The case is brought before your Lordships by an appeal from the judgment of the First Division of the Court of Session, contained in certain interlocutors which have been made the subject of discussion at your Lordships' bar, and which I shall have occasion to state presently; the principal interlocutor first appealed from, being an interlocutor of the Court of Session, to this effect, upon the report of the Lord Alloway, and having advised the memorials for the parties, 'the Lords advocate the process, and in 'the advocation, at the instance of Mr John Marjoribanks and 'others, find, that they are entitled to erect the passage to the 'proposed kitchen, billiard-room, and baths of the height and 'dimensions as said passage is delineated in the plan in process.' Your Lordships will allow me to call your particular attention to these words 'of the height and dimensions as said passage is 'delineated in the plan in process, and decern accordingly; and in 'advocation at the instance of Charles Gordon, find, decern, and 'declare in terms of the interlocutor of the Dean of Guild, find

* Taken from Mr Gurney's Short-hand Notes.

'the said Charles Gordon liable in the expenses of process; allow 'an account thereof to be lodged in the usual manner, and remit 'the same when lodged to the auditor of Court to tax and report.' The second interlocutor is an interlocutor, which only states those expenses, and directs Mr Gordon to pay those expenses. From these two interlocutors, the present appeal is brought before your Lordships.

"When I call your Lordships' attention to the words, 'that they 'are entitled to erect the passage to the proposed kitchen, billiard-'room, and baths, of the height and dimensions as said passage is 'delineated in the plan in process, and decern accordingly,' I do it for the purpose of pointing out a distinction between the language of this interlocutor, and the language of the judgment of the Dean of Guild, from whom the cause was advocated on both sides. *That* magistrate states, that 'having considered the peti-'tion for the managers of the New Club with the answers thereto, 'for Charles Gordon, Esq., replies, duplies, triplies, titles, and 'whole process, and also visited the premises, repels the objection, 'that the use to which the proposed buildings are to be put, is of 'the nature of a nuisance: Finds, that when the ground on which 'the New Town was built, was feued, a regular plan was laid down, 'in which the health and comfort of the inhabitants appear to 'have been consulted, by disposing of the back ground into areas, 'for the promotion of a free circulation of air, and adding beauty 'to the appearance, as well as of affording convenience to the 'inhabitants, and from which plan no deviation ought to have 'been permitted: Finds, that in cases where any material devia-'tion from the general plan has taken place, the same has either 'arisen from the consent of conterminous heritors, or from not 'being opposed by the public, or those having interest therein, in 'proper time: Finds, however, that no material deviation or in-'convenience will arise from the proposed change in the buildings 'belonging to the pursuers; therefore, grants warrant to them to 'make the alterations and additions craved, conform to the plan 'marked as relative hereto, under the special exception and con-'dition, that the height of the passage to the proposed kitchen, 'billiard-room, and baths, does not exceed that of the garden or 'division wall, and decerns.'

"Now, my Lords, the distinction between the two is contained in the particular language to which I called your Lordships' attention used in the interlocutor of the Court of Session, by which they declare the title of the plaintiffs to erect the passage 'of the height and 'dimensions, as said passage is delineated on the plan in process.' If this be correct, they would be entitled to erect it, in some respects, which I shall point out to your Lordships presently, higher than the garden or division wall; the Dean of Guild being of opinion, that they might make the alteration and additions 'under

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'this special exception and provision, that the height of the 'passage to the proposed kitchen, billiard-room, and baths, does 'not exceed that of the garden or division wall.'

"My Lords, the question between the parties arises out of a claim which the respondents made to build in the back area of a house they have in St Andrew Square, in the New Town of Edinburgh, a kitchen and other offices, according to the plan in process; this, as it has been represented to us, was opposed, on two grounds, the one, that building it according to the plan in process would be a nuisance, and certainly at law, independently of the specialties of this case, as arising out of the original plan of the New Town of Edinburgh, there can be no right to the respondents to put a nuisance in the neighbourhood of Mr Gordon, but he would have an extremely good title, to have it (if a nuisance) abated; but it does not appear to me that the Court of Session, or the counsel at the bar, have been very able to make out this to be a nuisance. I shall have occasion, presently, to state to your Lordships more particularly what has passed upon it; but the principal question is, Whether, regard being had to what your Lordships have heard, as to the original plan of the New Town of Edinburgh, by reason of what passed as to the form of that original plan, a party can be understood to have come under an obligation, not to the Magistrates of the town of Edinburgh, but to what are called here, the 'conterminous heritors,' not to build upon the area which stands behind this house?

The Question.

"My Lords, this plan, as it has been represented to us, is a plan delineating certain intended streets and squares, which are marked out by letters. As your Lordships will recollect, the particular feu of this party, is marked out by the letter N; different areas which were to be feued, were also marked out; and without now entering into a question, which would lead to a very great deal of discussion, whether there might not have been some plan, that would have evidently shown to a great variety of persons, what was expected of each of them, under that plan; I apprehend that the question in each particular case, must be, Whether the nature of that particular plan, and the transactions with reference to that particular plan, were such that the law would infer, where nothing is said about it, that there was a contract as between each and every of the persons who meant to deal upon the foundation of that plan, to keep the property in all respects, according to the exhibition or picture of it made in that particular plan?

The Plan.

"My Lords, we are told, that when St Andrew Square was to be built, the plan contained merely the sites of the buildings, and that with respect to all the rest, it was left as land apparently not to be covered; that all which the plan showed beyond this, was there delineated as grass; and that *that* plan was altogether silent

(if I may use such a word as silent, with regard to a plan) as to what was to be done with the areas behind the houses, except, that it represents those areas as being in grass; I think, further than that, we have not learned by the arguments at our bar.

" My Lords, it is stated in the cases which have been laid before you, that the plan did not represent even the depths to which the houses were to be built; it is stated to you, that although the areas in each lot that was feued, were to be separated from each other, the plan did not represent that they were to be separated from each other by walls, nor is it stated to you that the walls throughout the whole of the back part of this side of St Andrew Square, I mean those walls, which separate one conterminous heritor from the others, were to be built of the same height, or that the plan represented that they were to be built of any particular height, and much less of the same height. I mention these circumstances as the grounds of some observations I shall have occasion to make.

The Charter

" My Lords, the charter under which this New Club claims, was a charter granted to Mr Ross, 'on the narrative of his having 'paid the sum of £230 sterling as the rated purchase money of 42½ 'feet of ground of area, letter N, lying on the south side of St An- 'drew Square, and it dispones to him, his heirs, and assignees 'whomsoever, heritably and irredeemably, all and whole the said '42½ feet in front of area, letter N, lying on the south side of 'St Andrew Square.' This is, undoubtedly, the description of the lot; it certainly *refers* to the plan, and it does not appear to me possible to say, that the language of the charter contains more than that the property feued was lot N, between the neighbouring lot marked O, and the neighbouring lot marked M, which are described to be of the same size, and which I have taken the liberty to mention to your Lordships.

" My Lords, I mention the contents of this charter, rather as evidence of what the understanding between the parties at the time these transactions passed was, than as being the contents of that instrument which is to bind the conterminous heritors as between them and the Magistrates of Edinburgh; for it is not a question as between the Magistrates of Edinburgh and the persons who have taken these feus from the magistrates, but a question as to what is the faith which is to be represented as pledged by these heritors to each other, from which, one can infer, that they have gained what I may call a servitude upon the property of each other, and that these heritors have a legal right, upon this notion of good faith, to prevent a man from making every use of his property, which he may by law be entitled to, unless there are what in Scotland may be termed negative servitudes. There are legal servitudes, and there are conventional servitudes arising out of contracts; and the question is, Whether, from the transac-

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tions of these individuals with respect to this particular plan, to which I wish to confine myself in all I am stating, they can be said to have contracted with each other, to create these negative servitudes, to restrain each other from making that use of their land, which, independently of that contract, they would, by law, be entitled to?

"My Lords, the charter, taking that as evidence of the understanding of the parties, at the time, I will mention to your Lordships, describes as the subject of the grant, 'the whole space of 'ground within the line of the street, ways of the square, as now 'levelled and enclosed by a parapet wall, and iron rail, and that 'as a common property, with the several feuars around the square. 'But under the condition, that the aforesaid space be used 'allenarly,' which means, I suppose, 'for the pleasure, health, or 'other accommodation of the feuars or their families, but in no 'way to be converted into a common thoroughfare, or used to any 'other different purpose whatsoever,' so that the plan laid before those several undertakers to build, representing the square in front, grants this square as the common property of all that build the houses, but to be used only for the health, accommodation, or pleasure of the feuars and all their families; but with respect to the areas behind the houses, it does not say one single word on that subject, and as to other parts of the subject, namely, 'the 'dwelling-houses, cellarage, and back ground of the areas,' there is no restriction whatever in the charters, as we are told, except upon the right 'to subfeu, sell or dispose of all or any part of 'the piece of ground before disponed;' and then follow the words —upon which one of the parties at your Lordships' bar has laid great stress, the other saying that there is no stress whatever to be laid upon them—'or house or others built thereon, to be held 'of them or their heirs, or of any other interjected superior, but 'allenarly to be held of and under us, and our said successors in 'office, as superiors in all time coming.' Now, on one side, it is said, here is a right given to 'sub-feu, sell or dispose of all or 'any part of the piece of ground before disponed, or house or 'others built thereon.' Why, say they, if there is nothing to be built thereon but the house, what is the meaning of the words, 'house or others built thereon?' to which the other party answer, It is true there is the word 'others,' but it may mean appurtenances, thereby giving it a meaning which will account for its being inserted without its being specified to be detached buildings; and, at all events, they say, that although this charter gives a power to sell or dispose of the house and others built thereon, still, whether that power was legal, with respect to the conterminous heritors, will be a question to be determined; and I admit, that it is still a question to be determined. The question is not between the Magistrates of the city of Edinburgh and this per-

son, but between all the contractors, whether they purchased with these servitudes. Indeed, these words 'with others built 'thereon,' may be left out of this charter; because, when they have 'sub-feued the piece of ground before disponed,' the 'piece 'of ground' must include the site of the house, and the others built thereon, consequently, they might refer to those curtilages which we find referred to in Scotch, and very often in English conveyances.

"Then there is another clause in the charter, 'that it should 'be lawful for the proprietor "to exerce," that is, exercise any 'other act of ownership which may not be inconsistent with the 'manner of holding hereby prescribed, but under this declara- 'tion, that if he or his foresaids shall convert the subjects built 'upon the piece of ground hereby feued into breweries, or do 'any other act or deed to infer a claim of thirlage, they are to 'free and relieve us and our successors in office, the piece of 'ground hereby feued, and feu-duty payable for the same of and 'from the payment of all multures which can be claimed furth 'thereof, as payable to any mill to which the same may have 'been astricted.' Now, though dwelling-houses were to be built in part of the front of St Andrew Square, they contemplated even that there might be a brewery built upon the premises, and I only mention this, for the purpose of making this remark, which is only a repetition of what I have said over and over again before, but I mention it not only for the purpose of saying, that let the meaning of the charter be what it may, between those who granted and those who took the charter, *that* will not decide what are the rights of the several contractors, as between each other, if it can be said that their variance from the plan has produced a sort of breach of good faith; but I mention it as the most surprising thing in the world, if it was the general understanding of the Magistrates of Edinburgh, when they were feuing out this property, and if it was the general understanding of all parties, who were taking this sort of property from them, that this individual, and the other persons who were taking charters, like the present charter, should have supposed, that, without one single word said in the charter with reference to the use to be made of the back areas, there was a general understanding among all persons granting and taking those charters, that these were to remain gardens for ever, separated from each other by walls, of which there were no exhibition on the plan, which walls were not provided for, because they were not mentioned in the plan at all, and when, in point of fact, these areas have been dealt with, as your Lordships will see presently.

"Now, my Lords, do not let any one suppose, that I disregard what has been said, on which great stress has been laid, on the qualification of men of taste in the city of Edinburgh; far from it.

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I had once the pleasure of seeing that city when it was by no means so handsome as it is now, but it was, even then, I thought, one of the most striking and most beautiful places, especially where the New Town was built, that, perhaps, I ever beheld; but I must say, whatever may have been said in this place, and whatever my wishes may be, about taste and beauty, I come here to determine, what are the legal rights of men, and not to gratify taste, or to enhance the beauty of any city whatever, at the expense of laying down in judgment, that there has been a contract between parties, where I am satisfied, there has been no such thing.

"My Lords, after Mr Ross had got this charter, as it is stated to us, on what authority I do not know, but as it is stated to us, in the paper in my hand, he built in the front of his area a house with a series of closets behind, which, it is stated, reached to the second storey of the house, and about six feet above the highest part of the wall, which divides his area from the adjacent property. These closets, it is represented, were not found fault with at the time, and your Lordships will perceive, it very naturally happened that such should be built, but how one is to account for it, if there was this general understanding, that there were to be no buildings upon these areas, I really do not know, natural as it was. It happened, also, that in this city of Edinburgh, as you see in London, at the bottoms of areas, or gardens, coach-houses and stables have been built, one storey or two stories high. Now, I should be extremely glad to know what it was, in this plan, which these undertakers or builders saw, that could induce them to suppose, that they were under an obligation to keep one part of the area uncovered, and yet that they were not under any obligation to abstain from the building of coach-houses and stables, in another part of the area, and that this has been done very generally has also been represented to us.

"My Lords, I should wish here to omit referring to a circumstance that I see is stated in the case;—perhaps it bears, too, somewhat upon the question between the parties, that is this, that this plan for the improvement of Edinburgh having been formed in the year 1767, at the time the use of water-closets was not known in the principal city of the northern part of this kingdom, without the least authority for it, as far as we have heard from this plan, those buildings were erected in these areas without them, for want of those water-works which have since been introduced inside the house. I suppose there was such an absolute necessity for some of those conveniences, that that is the reason they have not been adverted to.

"My Lords, this house having been purchased for the purpose of carrying on a club, which club, I perceive, consists of about 300 members, and amongst these 300 members, as is extremely

natural, I have no doubt some of the Faculty of Advocates, and I am perfectly sure some of the learned judges; for, I observe, that the Lord Ordinary declines to give an opinion, because he is a member of the club; but when you come to consider the number of the gentlemen who form this club, and the character of many of them who form it (the most respectable), it appears to me rather a surprising thing, that it should be understood to be the law of the city of Edinburgh, that nothing could be built in the areas behind these houses. The club, consisting of 800 proprietors, set about these alterations which I am about to mention to your Lordships. My Lords, the club, of course, did not want, for most of the gentlemen, I dare say, who composed it, had these conveniences elsewhere—the club did not want stables and coach-houses, and they therefore thought of converting the stables and coach-houses into billiard-rooms, into baths; and as it was no longer absolutely necessary to have exposed to public view those buildings which had hitherto supplied the place of water-closets, they now employed their water-closets to supply a place for these buildings, and proposed to have two or three water-closets, likewise, under the roof of these buildings.

The fact is here mistaken by the short-hand writer. Note by S. and R. the Solicitors.

"My Lords, in order to do this, they seem, at least, to have intended,—certainly, I think, that must be admitted,—not to carry the passage which was to go from the centre of the house to the centre of the coach-house and stables, above the head of the division wall,—that was their first intention; however, they thought afterwards they should be much better accommodated if that passage was carried higher. It seems never to have struck any of them, nor any body else, that if they did not carry it higher than the walls of the conterminous heritors, it would be any breach of faith; but how it was to be collected from a plan which represented every thing as vacant, and how that could be understood to be the exhibition of an instrument which was to leave you at liberty to put some erections upon the premises, but not to put other erections upon the premises, and *that* understanding was so plainly expressed as to amount to a legal contract between the parties, it is somewhat difficult to understand,—certainly more difficult to understand than I know how to deal with. It appeared to them afterwards, however,—they having got, in truth, authority from the Dean of Guild to erect, though not to erect higher than the walls,—it appeared to them afterwards, that it would be more convenient to them to have a passage, which must be admitted to be somewhat higher at the one end, and considerably higher at the other, the wall being, I understand, on a sloping ground, and being higher near the house than near the stables. The way they set about it, my Lords, was this, they wished to have one passage above another, and in order to have the lower passage as low as they could well have it, they began lowering the ground in the

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area, meaning that the persons who went through the lower passage, should go from the lower story of the house itself, that is, the ground offices to the ground offices of this building, which had before been a coach-house and stable. They then set about adding another passage above that passage, and by making a communication between the windows of the dining-room and that passage, they were to go along the higher passage into the higher rooms of that building, which had been the coach-house and stables. The reason of their doing that was this, that if they had a right of access to these, they either must have had an outward access by steps, up to the upper part of the building, which would have been an additional building upon the area, and an additional building which must have been above the height of the wall in order to enable them to get to the upper part of the premises, or they must, in the lower part of the premises, have appropriated a part of that space which they meant to set apart for baths and other conveniences, for the purpose of making a staircase in the inside of the premises, which would have been giving away part of that billiard-room, in which the members of this New Club were to amuse themselves up stairs, and they thought it better, upon the whole, to raise this passage, and by means of that to communicate to the upper and under stories of this building.

"My Lords, this gave very great umbrage; and your Lordships will find from the papers, Mr Gordon did not choose to submit to it, and in truth, if it was no nuisance, strictly speaking, still, if it was a thing which was unpleasant, nay, I go a great deal farther, if they had no right so to build, whatever individuals may think about persons proceeding to insist upon their legal rights, although the waiving them might occasion no inconvenience to them, or injury to them, except to promote the convenience and the pleasure and comfort of their neighbours, yet I say again, in a court of justice, we have nothing to do with that; for the question before us, upon all occasions is, not what men of taste or men of honour are to do, but what is the contract between the parties and their true right in point of law? I desire, therefore, to have it understood, that if Mr Gordon can make out his right to destroy this passage altogether, in this Court, at least, we have no right to say that he was doing anything but what he was fully entitled to do.

"My Lords, there lived on the other side, however, of the house which was devoted to this club, a gentleman of the name of Dr Gregory, whom I have always understood to be a physician of very great eminence (I take it to be *that* Dr Gregory, though I am not sure I am right); and when we have this case disposed of as a nuisance, I do not think that any person can say, that Dr Gregory had any interest in having that building there, though

I see it is slyly insinuated that a *physician* could have no great interest to oppose *that* which would affect the health of his neighbours, but there is a most ingenious reason given for Dr Gregory's not making the same objections which Mr Gordon does. Mr Gordon objects that he may suffer by the smoke of the chimneys and the noise, I do not know whether he might not object to that very well; if these 300 gentlemen are to go and play at billiards near to the room where he is sleeping, he may have reason to complain of the noise, and if there is a good deal of festivity, not only the smoke, but the smell of the kitchen may be offensive; but it is well argued that Dr Gregory has no such reason to complain, because the house stands on the east or the west side of this house, I forget which, and that the wind at Edinburgh always blows from such a quarter, that the noise and the smell of this club-house, must be carried to Mr Gordon, and none of it to Dr Gregory. That is the account they gave of it in that respect.

"My Lords, the Court of Session was of the opinion I have mentioned to your Lordships, that is to say, I understand them to have been of opinion, that this was no material deviation from the plan, that it did not amount to a nuisance, and that there was nothing in the transactions with respect to that plan which prevented the owners of this house from building in the back area, as they thought proper to build. Mr Gordon has no building, I understand, at the bottom of his area; but, my Lords, there is a circumstance which is very material with respect to that, for, whatever might be the import of this plan, as manifesting that there was some faith, out of which you were to imply a contract with respect to St Andrew Square, the same must arise in respect of houses in Princes Street. Now, Mr Gordon appears to be the owner of a coach-house and stables at the bottom of the areas in Princes Street, how these coach-houses and stables got there, if so much is to be inferred, as is contended, I do not know; but if we are to believe these papers, Mr Gordon was obliged to come into covenant that he would not raise these coach-houses and stables higher than they were. Now, how is that consistent with their being built at all, and how is it consistent with the fact that he was prevented by a covenant he entered into, from carrying them higher? I say, my Lords, therefore, when this was taken to be a question between the Magistrates of Edinburgh, and the feuar, on the exhibition of the charter, under which he claims, the moment *that* is seen, *cadet questio;* where is the evidence that the feuar was under any obligation at their instance, to refrain from building on this area? But it may be a very different question as between the feuars amongst themselves, provided you can infuse into their charter, without a single word being contained in the charter, an obligation that they shall refrain, at the instance of

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each other, and that they be compelled at the instance of each other to abstain from building upon these areas.

"My Lords, I have before me a book on the Scotch law, which speaks of these servitudes as not to be inferred, unless they are expressly created; and therefore you are to look at this plan, and see what it is, and I do desire,—I am obliged to do it at the risk even of all the censure with which what I state may be received elsewhere,—a censure that I lay aside, as not worthy of much regard. It is my duty to speak my sincere opinion here, and I do not hesitate to say, that to infer such a contract as this, from such a plan as this, and from such transactions as have taken place in that plan, would be as violent a proceeding in judicature as, in the course of a very long life, I have ever witnessed. What is the plan? I do not mean to say that where a plan is held out, in the execution of which various persons are to be engaged, that *that* plan may not, of itself, point out to every individual who is to engage, not only what is to be his contract, with reference to the party he engages with, but also with all other parties, so as to constitute a ground for the Court's inferring that he has contracted, and that he ought to conform himself to all contained upon the face of that plan; but then the plan must speak out in intelligible language, or in such language, that it cannot be mistaken. I will take the case of *Butterworth*, there is a highly finished plan in the front, I mean in point of elegance of architecture, and the parties signed the plan which contained a representation of the building, and then they had their charter referring to that plan so signed; it was impossible to say, that a man who built the middle house of the three, could be permitted, having entered into that agreement, to injure the neighbouring houses on each side by a projection of his own, that would be destroying the whole of the plan. How does that bear upon the circumstance of a plan which represented nothing but houses built in front of St Andrew Square, where the charter provides, that the square shall be kept open and properly dealt with, and that *that* property shall be enjoyed only in such a way as shall conduce to the health and accommodation of all of them, and where not one syllable is said as to what shall be done with the ground behind the houses, that being exhibited simply as a plot of grass?—that you are to infer from all that—What? first, that the conterminous heritors may divide this into areas—*That* you may infer, because, where the plan states the contents of each man's feu, it would be a little too harsh to say, that a man should not enclose it though for his own benefit, but the plan says nothing of the *mode* of *enclosure;* the plan does not say, that A shall build his wall of such a height, and that B shall not build to a greater, or C shall not build to a less height, and, unless there was an agreement between these conterminous heritors to keep that space all open, how can you say there was an agree-

Butterworth v. Dirom, &c. June 2, 1812; Mor. 8y., No. 3, Note 6; also Hume's Coll. of Sess. Papers, vol. cxvi., which case had reference to a deviation from the plan of the houses in Charlotte Square.

ment as between two individuals, that they shall not build, each on his own side? It does appear to me, I confess, a thing perfectly impossible so to hold.

"My Lords, a case was stated to your Lordships, I mean the case of Deas *v.* the Magistrates of Edinburgh, which was heard in 1772, in presence of a noble and learned Lord, who then sat in this House, of whom I have often, not only taken the liberty, but done the justice to say, that as long as the law of Scotland exists, and as long as those possessing a profound knowledge of it are looked up to, the name of My Lord Mansfield will be viewed with veneration and respect. But, my Lords, in the case of the feoffees of Heriot's Hospital, I did take the liberty of saying *that*, which, if I had had the honour of sitting in the House at the same time, with that noble Lord, I should have said in his presence. The noble Lord, at that time, certainly almost exclusively disposed of all the questions relative to the law of Scotland in this House. My Lords, I am one of those who must state freely that I do not think *that* a happy constitution for any Court of Justice; but, if I had been here, I would have taken the liberty to state to that noble Lord, in his presence—always speaking with that respect and deference which must be due from such an individual as I am, to a man of so great and exalted a character as belonged to him, that, though the judgment he delivered was not intended to alarm the Corporation of Edinburgh, I, at least, am a man so infirm, that I could not have heard it, if I had been one of the Corporation of Edinburgh, without feeling it had that effect upon me. Your Lordships will pardon me, if I take the liberty again of saying that *that* judgment contains a great deal of attention to persons of taste, and to convenience; too much (if I may say so) regard being had to the act of the legislature which imposed no such conditions, as might, from such allusions, be supposed to be contained in it. I think, that in dwelling too much on that which was to be expected from the honour and character of parties, instead of standing on the legal rights of one party, and the legal obligations of another party, it steps a little aside from the legal subject of consideration of the learned judge.

Deas *v.* Magistrates of Edinburgh; *vide ante*, vol. ii., p. 259.

Heriot's Hospital *v.* Gibson Dow, vol. ii., p. 301.

"My Lords, with respect to the case to which I allude of the feoffees of Heriot's Hospital, I shall say nothing as to the observations which have been made upon that subject. It may be the opinion of some, that the decisions of this House are to be *obeyed*, but not to be *followed*; but, my Lords, I must take the liberty of saying this, that the interests of the subjects of this country would be in a situation, that would stand in great peril, if a doctrine of that kind were to be avowed and adopted; because, although, my Lords, every Court that I have ever set my foot in, in this part of the island, has considered, where there are circumstances in subsequent cases, varying the facts, from those which appeared in

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former cases, the Court is at liberty to judge upon the subsequent case, so formed of different circumstances, without being bound by such decisions; yet, noticing what has passed in the House of Lords, I do not think it ever fell from the mouth of any English judge, that when there was no difference of circumstances he would obey in the particular cases in which the House had given its judgment, but would *not follow that* in after decisions. That is not the doctrine to which we have been used in this country. But really, my Lords, that case of the feoffees of Heriot's Hospital, although it may raise an observation upon Deas' case, might have been, and was determined on grounds, which did not at all interfere with that case. What was the case of Heriot's Hospital? The Magistrates of Edinburgh and Heriot's Hospital had each a property in the site of a street; a price was paid for the lot; it was feued out by the Magistrates of Edinburgh, and the feuar was to pay a feu-duty to Heriot's Hospital, as a consideration for his feu right. At the time that this transaction took place, there was a plan drawn out, and the Corporation of Edinburgh had an Act of Parliament, which enabled them, during a limited time, to purchase some small tenements, which stood on a particular spot of ground, so as to form the street, in the handsome way they desired. That Act of Parliament having expired, the magistrates no longer had that power under the Act of Parliament. The feoffees of Heriot's charity demanded the feu-duty, the answer given by the tenant, was, that he would not pay the feu-duty, because that plan having held out that the street was to be so and so constructed, and those old buildings not being purchased by the corporation, he ought not to be called upon to pay the duty, and on that occasion, I confess, I was weak enough, to be clearly of opinion, that it was impossible for him to maintain that plea. If this person had any right to call upon the magistrates to remove these buildings, he should have called upon the magistrates to remove the buildings, but how could that entitle him to object to pay the feu-duty to Heriot's Hospital? and I was weak enough too, to say, if you hold out a plan, that means no more than this is what I propose to do, if I can accomplish it, it is for you to engage, if you please, upon the presumption that it will be executed.

"My Lords, we have been hearing to day about Scotch entails and English entails, and no man is more ready than I am to admit that it is an extremely difficult thing for the mind of an English lawyer to deal accurately and properly with matters of Scotch entail, and I am perfectly sensible, that we often fall into error by supposing there is more similarity between these tenures than there really is, and it is not to be wondered at; for we have had stated to us from the bar this very day, by Mr Grant, most eminent as a Scotch lawyer, what was an English entail, and I was under the necessity of asking Mr Grant, whether that was an English

entail, as that was not my idea of it; and so with respect to the Scotch law, to apply this to questions that come before us.—I think it my duty, and have always said so, to keep in view the distinctions between the laws of the two countries, and perhaps, if I have been remarkable for any thing in the course of my judicial life, it is for the care and vigilance I have used to keep my own mind on Scotch judicature, free from English impressions, and for that reason, I looked for fear I should be misled by my English notions; for I feel it impossible to contend with respect to English law, that if the Duke of Bedford, for instance, or any body else, laid out a plan of such a place as Gower Street, with areas and gardens behind, unless we put his Grace under covenant that he would not spoil our prospect, we would come into a court of justice, and say do not let the Duke of Bedford make the best use he can of his property. I thought it might be otherwise in Scotland; and I was readily disposed to believe it might be otherwise; and if the plan shown in Deas' case, was one, that pointed out to every person who dealt with the Corporation in such a manner, that they could not mistake it, what they were to do, and what they were not to do, the faith of each of these heritors must be considered as pledged to each other.

"But, my Lords, it may be asked, if that faith is created, how came it that no attention has been called to it till this very day? That very case of Deas is evidence, that there was no such contract understood, for that rested on grounds of inference from facts such as occur in almost every case. The plan was laid down in the year 1767; the case of Deas in this House was in 1772, only five years afterwards, and yet it is supposed, that the exhibition of that plan in 1767, had created, what is called in the books before us, the common law of the city of Edinburgh, and had created an exception in every heritor, that no one should do any act which would spoil the picture which had been drawn; and yet, the case of Deas in this House, was a reversal of the judgment of the Court of Session, which had held there was no clear understanding. To be sure, my Lords, it is a most extraordinary circumstance, if there was such a clear breach of good faith in that case; if there was so clear a contract as it has been represented to be; if, in truth, there was so clear an understanding, that it might have been, perhaps, even then, represented as quite wild for any man to think, as I thought in the case of the feoffees of Heriot's Hospital,—it is most extraordinary, if this constituted the common law of Edinburgh, that the Court of Session, sitting within five years afterwards, should have held that there was no such contract, and no such understanding that there was such a contract, and that then this House, knowing much better what the common law of Scotland was, should have held, that there was such an understood contract, so it is in the present instance; here

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This had reference to the Heriot's Hospital case, and the present, which were decided by different Divisions of the Court.

is one Division of the Court of Session of opinion there is such a contract, and the other Division is of opinion, that there is no such contract. I take the liberty of asking, for the benefit of my fellow-subjects, whether it is an expedient mode of distributing justice, to say, that you will infer contracts as having been clearly entered into, when, in the first instance, the Court of Sesion, not as yet divided into two divisions, did not judicially think there was any such contract, and when at this day that Court, now separated into two Divisions, think, the one Division, that there was, and the other Division, that there was no such contract.

"My Lords, I would also beg leave to apologize, if I misled your Lordships, when I ventured to think in that case of the feoffees of Heriot's Hospital, that the question of right had not been determined in the case of Deas, by stating that the remit to the Court of Session was, that they should pass the bill of suspension, and join in the action of declarator, in order that the question of right might be tried, for those are the very words which induced me to believe that the question of right was not decided. I did state, certainly, at the time, that no person could doubt what Lord Mansfield's opinion would have been, if there had been no proceeding but the bill of suspension; but when his Lordship was of opinion that the bill of suspension should pass, and the cause should be remitted to the Court of Session, and the action of declarator joined, in order that the action of declarator should be decided, that certainly supposed that the action of declarator had not been decided, but in that I might be mistaken.

"My Lords, to illustrate this a little more, I should be glad to know, if these heritors in St Andrew Square, were at liberty to separate the area of one conterminous heritor from the area of another conterminous heritor, where am I to find the contract as to that separation? It is admitted that they did build separation walls of different heights; now, I will take this club house, with Mr Gordon on the one side, and Dr Gregory on the other; where is the evidence that the new club or Mr Ross, from whom they purchased, could say to Mr Gordon, I will separate my area from yours, by a wall six feet high, but that he might go to Dr Gregory and say, your area and mine shall be separated by a wall ten feet high? How can it be contended, on the other side, if Mr Gordon could not complain that the wall which separated Mr Ross and Dr Gregory, was four feet too high, that he has a right to complain of some intermediate wall being built, which is too high? Where is there to be found, in this plan, or any part of this plan, any evidence that the conterminous heritors ever came into a contract with each other, that they would build their separation walls of equal height, or that they would build any separation walls at all? So, my Lords, I say the plan exhibited a piece of vacant ground, but that it was to remain vacant ground without

separation walls, I admit could not be. Then, how does it happen that all these stables and coach houses have been built? and in the next place, how does it happen that in the cases you find so much admission, that all this vacant ground might be covered over with any buildings whatever, provided they were not higher than the conterminous walls?

"Now, I will put another question. If a proprietor was at liberty, with the consent of his neighbours on one side, to build a wall six feet high, and was not at liberty, because his neighbour on the other, would not allow a wall more than four feet high, what was to be the height of the buildings? In short, difficulties present themselves over and over again, when you are *inferring* contracts, in order to impose negative servitudes, which, like all servitudes, legal or conventional, are not to be raised up by implication, but to be inferred only, where it is clearly and manifestly shown to be the intention of the parties. I say, further, that the circumstance of all those persons who took the feus, taking the charter with an obligation as to what they were to do, with respect to the front square, and with no contract whatever in that charter as to the ground behind, the question not being as between the magistrates and the persons who took the feus, but with the persons who took the feus as between themselves, there being this agreement as to the ground in front of St Andrew Square, but no restriction as to the areas,—there being this evidence of fact to oppose to the evidence which arises from the mere exhibition of this plan, as I have represented, it does appear to me to afford very strong ground, *not* that there was such a contract between the feuars, but that there was *no* such contract between the feuars.

"My Lords, I offer to your Lordships this opinion, not because I like to give it, because, though I do not pretend to much taste, I know there are those in your Lordships' House, who have much taste, and if I could secure, by the administration of such law as I am authorized to administer, all the beauty which is wished to be concentrated in Edinburgh; and if I could withdraw from it, all inconsistent with the beauty which still remains, I should be glad to do it, but I cannot do it at the expense of stating to your Lordships, *that* which I do not believe to be law, nor of stating *that* which I think is nothing like law. Upon this ground I have felt myself called upon to express the opinion which I have done.

"There is one point only which I do not think is explained; and if the parties wish to have any inquiry into that, I do not know how it can be withheld. The wall which divides the property, is the common property of the two conterminous heritors, and the one has no right to lay a greater burden upon that wall, than the contract between him and the other conterminous heritors will enable him to do. It was stated by the Lord Advocate, here at the bar, that not one single word had been urged in the Court

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below, whether the billiard-rooms, baths, water-closets, &c., did not lay a much greater onus upon the wall than the old stable and coach-house; but that is a matter of controversy in the papers, and if it is wished there should be further inquiry on that, I do not see how it can be resisted. It is upon this ground I offer to your Lordships, with this qualification, my opinion that the decision of the First Division of the Court of Session is right in this particular case, not that I do not say there has been no plan, but that I cannot infer that which is desired from the plan, and if, to-morrow, any intimation is made to me on the subject of this inquiry, whether it is necessary it should be prosecuted or not, we may then affirm, or so far reverse the judgment, as your Lordships may then be advised, and with that intention, I shall move your Lordships that this matter shall be postponed till to-morrow morning."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Brougham, W. G. Adam.*

For the Respondents, *Sir Saml. Romilly, Fra. Horner, Adam Duff.*

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WADDELL, &c. v. WADDELL.

GEORGE WADDELL of Ballochnie, and WILLIAM WADDELL, W.S., now of Easter Moffat, ... } *Appellants;*

MISS JEAN WADDELL of Easter Moffat, . *Respondent.*

House of Lords, 9th, March 1818.

LIFERENTER AND FIAR.—A testator left his sister the liferent of his heritable estate and his moveables, burdened with payment of "*all his* lawful debts," &c. The fee of this property, together with his moveable debts he left to the appellants. The moveable estate left to the sister fell far short of paying the deceased's debts: Held her entitled to relief from the fiar, in so far as these debts exceeded the personal effects left her. Reversed in the House of Lords.

By the settlement of the deceased William Waddell, of Easter Moffat, he conveyed the fee of his heritable estate, and of his moveable debts, which might belong or be due to him at his death, to the appellants, in certain proportions. To the respondent he conveyed the liferent of these subjects, and the property, or *ipsa corpora* of the moveables in his actual

possession, under this express proviso, that she (the respondent) "shall be bound and obliged, as by acceptation hereof, she "binds and obliges herself to pay all my just and lawful debts."

The question, therefore, was, whether the burden of paying the deceased's debts had been put absolutely on the liferenter; or whether the fiars were liable in relief, in so far as they exceeded the moveable estate left to her.

Lord Balmuto (Ordinary) pronounced this interlocutor: "Finds that the deceased, William Waddell of Easter Moffat, Dec. 11, 1813.
"'for the love, favour, and affection, which he bore to Jean
"'Waddell, his sister,' by a deed of settlement, 'disponed
"'and assigned to, and in favour of, the said Jean Waddell
"'in liferent, and George and William Waddell, his nephews,
"'in fee, his personal, and heritable estate; but declaring
"'that the said Jean Waddell, by acceptation hereof, is
"'bound and obliged to pay all my just and lawful debts,
"'funeral expenses, and any gifts or legacies I may think
"'proper to leave, by a writing under my hand;' that this
"declaration is coupled with this other clause: 'in order the
"'more easily to carry my intentions, with regard to my
"'moveable property, into execution, I hereby empower the
"'said Jean Waddell to sell and dispose of whatever part of
"'my moveable property above assigned to her in liferent,
"'and the said George Waddell, in fee, she may think
"'proper, and convert the same into cash; and after pay-
"'ment of my debts, sick-bed, and funeral expenses, to lend
"'out the remainder of the money on heritable bonds, taken
"'payable to herself in liferent, and the said George Waddell,
"'in fee;' which unequivocally indicates the opinion and
"belief of the testator that his personal estate was more than
"sufficient to pay his funeral expenses, all debts that were
"due by him; that in no view could it be the intention
"of the late Mr Waddell, to burden his sister with his
"debts, in the event of their exceeding his moveable estate,
"and deprive her of the favourable situation in which he had
"placed her, by giving her the liferent of his whole property;
"Finds it is not denied that the personal funds have fallen
"greatly short of the debts of the late Mr Waddell, and
"therefore that the pursuer (respondent) is entitled to be
"relieved by the defenders, fiars of the heritable estates, in
"proportion to the value of these estates, in so far as the
"principal sums due by the late Mr Waddell exceed the
"personal funds and effects, the pursuer (respondent) being
"always liable for the interest of such sums, from the death
"of the late Mr Waddell, until the defenders shall enter into

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"possession, and draw the rents of the heritable property. "But before further answer, appoints the pursuer to give in "a specific condescendence of the debts due to the deceased "Mr Waddell, and of all other moveables belonging to him "which she has, or might have intromitted with, and of the "amount of the debts due by him which she has paid, or are "still resting, distinguishing the interest from the principal; "and when the said condescendence is lodged, allows the de- "fenders to see and answer the same."

On representation, the Lord Ordinary reported the case to

June 16, 1814. the Court, and the Court, of this date, pronounced this interlocutor: "Upon report of Lord Balmuto, and having advised "the informations for the parties, the Lords find and declare "in terms of the Lord Ordinary's interlocutor, of date 11th "Dec. 1813; and remit to the Lord Ordinary to proceed ac- "cordingly; but find the defenders not liable in the expenses "of process." On reclaiming petition the Court adhered.

Dec. 22, 1814. Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged by the Lords, that the said interlocutors therein complained of be, and the same are hereby reversed; and that the defenders (appellants) be assoilzied; but without prejudice to any claim, if any such the pursuer could sustain, against the defenders (appellants) in case the interest she derived under the disposition stated, should fall short of the amount of the debts paid, or to be paid, by the pursuer (respondent).

For the Appellants, *Sir Saml. Romilly, John Clerk, John Fullerton.*

For the Respondent, *John Leach, John Cunninghame.*

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MACKENZIE, &C. v. MACKENZIE, &C.

SIR HECTOR MACKENZIE of Gairloch, Bart., and ALEX. MACKENZIE, Esq. of Hilton, . *Appellants;*

The Hon. Mrs MARIA HAY MACKENZIE of Cromarty, and EDWARD HAY MACKENZIE, Esq., her Husband, for his interest, and HENRY DAVIDSON, Esq., of Tulloch, ... } *Respondents.*

House of Lords, 18th March 1818.

PRESCRIPTIVE POSSESSION—GRAZING GROUNDS—PART AND PERTINENTS.—A proprietor, who had possessed from time immemo-

rial certain grazing grounds, as part and pertinent of his estate of Cromarty, which possession was fortified by a possessory judgment and other articles of evidence, was held entitled to be preferred to the exclusive right and possession, in preference to another party whose titles bore expressly to convey to him the property of these grazing grounds, but who had not so clear a possession.

An action of declarator was brought by the appellants before the Court of Session, to have it found, 1st, As to Sir Hector Mackenzie, that there was, agreeably to charter in his favour, a vested right of property in a piece of pasture land of considerable extent, denominated the grazing of Orra; and, 2d, To have it found that, by disposition from Sir Hector, there was also vested in the other appellant, Mr Mackenzie, a servitude of commonty, or common pasturage, in that grazing, for certain lands. Mr Mackenzie also claimed a similiar right of commonty, as *pertinent* of certain other lands held by him in respect of *possession*.

In defence, the respondents pleaded, 1st, That the pasture lands in question belonged exclusively to them, as a part or pendicle of the estate of Cromarty; 2d, That they had not only a prescriptive possession of these lands, but that they had possessed the lands in question in virtue of a possessory judgment of the Sheriff, acquiesced in by the pursuers.

The statement made by the respondents was, that though no express mention of the grazings of Orra appeared in their title deeds, yet that the tract of ground known as such, adjoining to, or forming part of the hill of Weaves, or (as it was sometimes spelled) Weyvas, was almost entirely surrounded by that part of the Cromarty estate which is situated in the valley called Strathpeffer, and had accordingly been considered, for time immemorial, as part of the estate. It lay in the immediate vicinity of Castle-leod, which was formerly the mansion house of Cromarty, and at which the family was still accustomed to spend part of the summer season. That this grazing was proved to belong to the Cromarty estate, by the plans of the estate, taken when the lands were surveyed when forfeited to the Crown. It had always been included in the barony of Castle-leod; and they had exercised every act of ownership over it, from the earliest times down to the present day.

The respondents admitted that, by the appellant, Sir Hector Mackenzie's titles, there was an express right conferred to the grazings of Orra; but they contended that, in

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law, immemorial or prescriptive possession was superior to any written grant whatever, and that such possession, as *part* and *pertinent* of his contiguous estate, was sufficient to carry the property of that subject, even against an express infeftment in favour of another party, taken upon it as a separate tenement.

Young v. Carmichael, Nov. 17, 1671; Mor. p. 9636. Countess of Moray v. Wemyss, Feb. 20, 1675; Mor. p. 9636.

On the other hand, the appellants pleaded, that a party who claims a subject in virtue of an express grant is, *in dubio*, to be preferred to one who claims it only as *part and pertinent*.

Dec. 1, 1812.

The proof of possession having been allowed by the Lord Ordinary (Armadale) and reported, his Lordship pronounced this interlocutor: "Having considered the mutual memorials "for the parties, proof adduced, and plans, together with the "whole proceedings; Finds, that the defenders, proprietors "of the estate of Cromarty, have not only possessed the "lands in question, in virtue of a possessory judgment of the "Sheriff, acquiesced in by the pursuer at the time, but have "also produced a complete title to the lands in question, "supported and explained, not only by the parole evidence, "but by a plan made out by Mr May, the surveyor appointed "by those acting for the Crown, in 1756, when the estate of "Cromarty was in the hands of the Crown, for the purpose "of establishing and shewing the boundaries of that pro-"perty; therefore, and upon the whole other circumstances "and evidence corroborative thereof, sustains the defences, "assoilzies the defenders, and decerns accordingly."

June 3 and 5, 1813. Nov. 26, 1813.

On reclaiming petition to the First Division of the Court, the Lords adhered; and a further reclaiming petition was unanimously refused.

Against these interlocutors, the present appeal was brought by the pursuers (appellants) to the House of Lords.

Pleaded for the Appellants.—The respondents founded much on the possessory judgment of the Sheriff, pronounced in their favour; but the mere circumstance, that the appellants did not carry that judgment to a higher court, and that they delayed, for some years, in bringing forward the present declarator, is of no importance, and does not establish any acquiescence. The appellant, Sir Hector Mackenzie, and the other appellant as his disponee in the lands of Dochcairn and Dochpollo, are entitled to found on an express infeftment in the grazing of Orra, the subject in dispute, granted above two hundred years ago, and continued ever since in the charters of Sir Hector's estate of Gairloch, and are, therefore, to be preferred to the respondents, who have no infeftment in which this grazing ground of Orra is mentioned. Besides,

the Orra has always been immemorially known by a distinct name, as a separate subject. Under his titles, Sir Hector Mackenzie has further possessed the Orra in general, by his tenants, who grazed their cattle upon it, without hinderance or objection from any one, from time immemorial down to the year 1802. Any possession, therefore, had by the Cromarty family, must have been *joint* with that enjoyed by Sir Hector and his tenants. In these circumstances, therefore, and agreeably to the rules of law of Scotland, the appellant, Sir Hector Mackenzie, must be preferred to the sole property of the Orra, leaving the respondents a *servitude* of *pasturage;* and *a fortiori* that subject cannot be found to be the exclusive property of the respondents.

Pleaded for the Respondents.—The right of the respondents to the grazing of Orra, is established by constant and uninterrupted possession, and the exercise, from time immemorial, of every act of ownership, of which the nature of the ground and circumstances of the country rendered it susceptible. Any possession, on the other hand, which the appellants have enjoyed, was merely by the tolerance or express permission of the respondents or their tenants, and is totally insufficient to support a right of property or even of servitude, over this grazing. 2d, The right of the respondents being thus supported by possession, could not be at all affected by any written title which might be produced by the appellants, even though that title referred directly to the ground in question, and was liable to no objection. Possession by one party of a subject as part and pertinent of his contiguous estate, has often been found to carry the property of that subject, even against an express infeftment, in favour of another party, taken upon it as a separate tenement. But 3d, The written title of the appellants is liable to insuperable objections, and so far from supporting, is in itself destructive of their plea. On the other hand, the infeftment of the respondents, as illustrated by the topographical situation of the ground to which it refers, evidently comprehends the grazing of Orra, now in dispute.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, affirmed.

For the Appellants, *Sir Saml. Romilly, J. H. Mackenzie.*

For the Respondents, *Wm. Murray, Ja. Walker.*

NOTE.—Unreported in the Court of Session.

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FARQUHARSON v. THE EARL OF ABOYNE.

[Fac. Coll. vol. xviii., p. 10; and Ross' Land Rights, vol. i., p. 44.]

ARCHIBALD FARQUHARSON, Esq. of Finzean, *Appellant;*

GEORGE, EARL OF ABOYNE, . . *Respondent.*

House of Lords, 22d April 1818.

CHARTER—TENENDAS CLAUSE—RIGHT OF HUNTING AND FOWLING—DECREE-ARBITRAL.—A party claimed a right of hunting and fowling in the forest of Birse, on two grounds, 1st, That he had, in virtue of his titles, such an interest in the forest, as to carry along with it the accessory right of hunting and fowling. 2d, By express grant, he alleged such right had been conferred on him over the whole forest. Held (1) That the express grant which mentioned hunting and fowling was inept, as being disconform to its warrant. (2), That this mention of such a right was merely in the *tenendas* clause of the charter, but such, without also being mentioned in the dispositive clause, could not give a valid right. And (3), That such a right could not be included within the clause *cum pertinentibus*, as it did not partake of that character, nor was it a natural incident to the right ascertained to belong to the appellant. Affirmed.

The lands of Brass or Birse, had been conveyed by William the Lion, in 1170, to the Bishop and See of Aberdeen, together with the forest of Brass or Birse.

The bishop had, from time to time, granted feu rights of these lands, sometimes with the express right of pasturage in the forest of Brass or Birse, and sometimes with the power and faculty of appropriating and cultivating the same.

Many of these feu rights came afterwards to be vested in the appellant. In particular, he stated that his titles to the lands
1543. of Ennochies and Easter Cluny, were derived directly from the bishop by his predecessors, and were conveyed in the dispositive clause, thus: "Omnes et singulas terras nostras de En-
" nochies et Easter Clune, cum pendiculis et pertinentibus infra
" schyram nostram de Brass vicecomitatem de Aberdeen."

By the *tenendas* clause of this conveyance, it bore to be granted to be held "cum aucupationibus venationibus, pisca-
" tionibus, necnon cum communi pastura libroque introitu et
" exitu et cum liberate et facultate terras non cultas arandi
" lucrandi et appropriandi." The charter of 1559 in regard
" to his other lands, was conceived in the same terms.

What the appellant contended was, that by these feu charters there was conveyed to the vassals the right of appro-

priating such parts of the forests of Birse and Glenaven as he chose to cultivate, and that this clause, although in the *tenendas*, was quite sufficient to convey this right.

Further, his lands of Balfadye and Cragbeg, were in like manner feued out by the bishop to Gordon of Cluny, and he disponed them in 1574, to Patrick Gardyne, to whom the bishop granted a charter in the following terms:—"Omnes "et singulas terras de Balfedie et Cragheg, cum earum pen- "diculis et pertinentiis cum communi pastura in forestis de "Brass, Glenfechan et Glenaven, et per singulas erundem "partes ut Auchinspittal, Auchenbreck, Boigiesheil, Grene- "hillock, ceterasq' earum partes prius cultas in domibus "ædificiis et terris arabilibus ac etiam per prius nunquam "cultas tam non nominatis," &c. 1574.

In the tenendas clause of this charter, the lands were conveyed to be held "per omnes rectas metas suas antiquas et divi- "sas prout jacent in longitudine et latitudine in domibus ædi- "ficiis bocis planis moris maresiis viis semitis aquis stagnis rivu- "lis pratis pascuis et pasturis molendinis multuris et eorum "sequelis, *aucupationibus et venationibus per predictas nostras* "*et per forestas de Brass prenominatas et singulas eorum partes* "*suprascript, piscationibus per aquam de Dee adjacen* pe- "tariis turbariis carbonibus carbonariis lignis lapicidiis lapide "et calce silvis nemoribus et virgultis cuniculis conicularis "columbis columbariis fabrilibus brasinis brueriis genestis "&c., *absque tamen prejudicio litere ballivatus nobili et potenti* "*domino Georgio comiti de Huntlie Domino Gordoun de Bade-* "*noch* suisque hæredibus antea concess' *cum potestate terras* "*non cultas arandi lucrandi et appropriandi* ac cum omnibus "aliis et singulis libertatibus," &c., "cum pendiculis et per- "tinen' cum commini pastura in forestes an tedictis," &c. 1708.

These lands having been acquired by the appellant's ancestor, were created into the barony of Finzean in 1708.

Under these charters and feu rights, now vested in the appellant, he now claimed, in the present action, a right of hunting and fowling over the forest of Birse; and of fishing in the river Dee, and alleged that he and his predecessors had enjoyed the possession of this privilege, without interruption, from the date of the grant in 1574.

On the other hand, the respondent had a conveyance by Gordon of Cluny to his predecessors, dated 2d December 1636, conveying "all and haill the forest of Brass (Birse), upon every "side of the water of Feugh, comprehending the lands after "specified" (Here the whole lands are named), "with all

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" and sundry houses, biggings, yards, tofts, crofts, outsets, " insets, mosses, moors, meadows, commonty, common pas- " turage within the same, and with like commonty and " common pasturage to the tenants and occupiers of the " said lands of Cranna and Haughspittal, in the forests of " Glenaven and Glencat, &c., sheallings, tenants, tenandries " and services of free tenants, haill woods, bogs shaws, timber, " trees and planting presently growing within the said forests, " parts, pendicles, and pertinents whatsoever, lying within " the parish of Birse, and sheriffdom of Aberdeen: Reser- " vand always to the feuars of Birse, qu'hais right, thereof, " proceeds immediately frae me the said Sir Alexander, " commonty, common pasturage to their bestial, and powers " of bigging sheallings and ruives through all the rest of the " forest of Birse, excepting only the said lands of Haugh- " spittal and Cranna, conformed to the said infeftments " granted by the said Sir Alexander to them thereupon; as " also reservand Glenaven and Glencat, disponed to Mr John " Ross, parson, of Birse, and William Mortimer, in Glencat, " respective, conform to their rights made thereanent," &c.

The *property* of the *forest* was thereafter sold to the Earl of Aboyne; and by Crown charter (1676) the absolute property of the forest was conveyed to him " cum officio et juris- " dictione forestriæ infra forestas de Morven, Culblane et " Birse," &c.

The Earl of Aboyne having attempted to make encroachments upon the right of commonty and pasturage acquired by the feuars of Birse, a submission was entered into by him and the appellant, in which a decree-arbitral was pronounced,

1755. finding that " the right of property of the said forest belonged " to the within named Earl of Aboyne, *subject always to the* " *restrictions and servitudes after mentioned*, in favour of the " heritors of the parish of Birse." 2d, The exclusive property of certain parts of the forest called Haughspittal and Cranna, and thirty acres thereto adjoining, lying locally within the bounds before described, belongs to the Earl of Aboyne, free of any servitude. 3d, " We find and declare that the lands " of Auchabreck lie also locally within the bounds of the " said forest; and we find and declare that the 50 Scotch " acres of the said lands of Auchabreck, including the stead- " ing, do belong in exclusive property to the said Francis " Farquharson of Finzean, and his heirs and successors, to " be enjoyed, freed and exempted from all servitudes of " pasturage or other servitudes whatsoever, from the said

"Earl, and other heritors of the said parish of Birse, in all "time coming. 4th, That albeit, the property of the said "whole forest of Birse was originally in the said Charles, "Earl of Aboyne and his authors; yet, notwithstanding "thereof, that the said Francis Farquharson of Finzean, for "his lands and barony of Finzean, and his other lands within "the said parish of Birse, and the whole other heritors, sub-"mitters for their respective properties within the said "parish, have, by virtue of their rights, titles, and evidents, "and of their constant and immemorial use and possession, "prescribed and acquired within the bounds of the said "whole forest (except the lands of Haughspittal and Cranna, "and 30 acres thereto adjoining; and also except 50 acres "of the said lands of Auchabreck, as specially circumscribed "and bounded in manner above mentioned), a perpetual "right of servitude of shealing and pasturage for their cattle, "and casting, winning, and away leading fuel, turf, heather, "feal and divot within and furth of the same, in conjunction "with the tenants of the said Earl of Aboyne's lands of "Kirkton of Birse, and the half of Torfinlachie, lying also "within the said parish. And we find the said servitudes do "exhaust the superficial use of the said whole forest, excepting 'the said lands of Haughspittal and Cranna, as aforesaid."

This decree-arbitral, the appellant maintained, did not include the claim now made by him to a right of hunting and fowling in the said forest of Birse, but ascertained his right of property and interest in the same.

The pleas in law which the appellant maintained, were, therefore, 1st, That he had, in virtue of his titles, such an interest in the forest as to carry along with it the accessorial right of hunting and fowling over it; and 2d, That he had vested in him by these titles, an express grant of the right or privilege of hunting and fowling in the said forest of Birse. It was answered, that the respondent had vested in him by his superior right, a twofold title of *property* and *forestry*. In virtue of the former, he was entitled to prevent all from hunting and fowling in his forest. In virtue of the latter, he was entitled to exclude all others from hunting and fowling; and that the rights of property and forestry were in no way altered or affected by the decree-arbitral in 1755.

The Lord Ordinary (Meadowbank), after several interlocutors to the same purport, pronounced this interlocutor:— "Finds that the franchise or liberty and privilege of hunting and fowling in the forest of Birse, is not a prædial ser- Nov. 18, 1812.

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" vitude, nor entitled to the legal characters thereof. Finds, " further, that it cannot be maintained as incident or per- " tinent of the particular rights specified in the decree-arbi- " tral, as belonging to Finzean in that forest, and, *quoad* " *ultra*, takes the case to report, and ordains information to " be boxed in fourteen days."*

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* Note by the Lord Ordinary :—

" The Lord Ordinary is quite convinced that a right of hunting " and fowling cannot be a prædial servitude, ubi prædium servit " prædio. The argument, on this point, in Lord Aboyne's obser- " vations on Mr Farquharson's additional memorial, appears to " the Lord Ordinary equally acute and solid; and in the same " manner as the right in question could be no ways serviceable " to the dominant tenement, or the occupation under that right, " be any measure of the extent of subject acquired, so may it also " be observed, that the recognized way in which the right is " exercised, where friends and neighbours that have a taste for " the amusement exercise it for generations, while the owners " utterly neglect it, would long ere now have rendered the right " an object of such universal acquisition, if capable of it as a " servitude, that a reciprocity of right to the sports of the field, " would long ere now have been established over Scotland.

" The Lord Ordinary also retains his former opinion, that the " right, as declared by the decreet-arbitral, cannot be converted, " in legal construction, into such a right of property, that the " franchise of hunting and fowling can be ascribed as incident to " it. He is very ready to believe that the arbiters had something " afloat in their heads, which would have induced them to declare " a proper *jus superficiei*, had they understood how to form a clear " conception of the thing. We want the name, which the Ger- " mans have, but we have the substance of such a right. A " feudal grant of an estate, reserving all minerals of every de- " scription from a few feet, say five or ten feet under the surface, " with a liberty of access, is a good feudal grant, and confers an " estate to be valued in the cess books, and confers all qualifications " of landed property; and this is correctly a *jus superficiei* only. " But the arbiters, instead of conferring this in commonty, or " anything legally like this, have contemplated only the ordinary " rights of servitude, as sufficiently adequate to their purpose; " and though, in conferring them they declare, 'and thus the " 'superficial uses of the soil are exhausted,' can courts rectify " this incorrect apprehension of the arbiters, and bestow a *jus* " *superficiei*, where they, in express terms, confer only servitudes? " It is thought, that in construing titles, Courts are bound to " follow the views of the persons who frame them, and that they

Lord Meadowbank had, by a previous interlocutor, found that the appellant had no right of common property, but only rights of servitude in the forest. The case in this declarator at the Earl's instance came then before the Court on these informations, directed to the discussion of two points: 1st, Whether the appellant had a right of hunting under his titles and alleged possession? 2d, If he had, was it virtually cut down by the decree-arbitral?

The Court, of this date, found, "That the defender has "not produced a sufficient title for conferring a right to the "franchise in question; and, therefore, in the declarator May 26, 1813.

"must not assume the power of transmitting titles from one class "of rights to a superior, although they may conjecture that those "persons, if better advised, might probably have done so. This, "indeed, would be to amend rather than to interpret; and, though "in forming a construction, and weighing evidence, Courts "must often content themselves with probabilities, and even in "construing titles, must, under a general uncertainty, adopt what "appears most probable; still it is thought, that when they have "clear technical expressions to interpret, they can never be "justified to make these bend to mere probabilities of what might "have been done, but what was not done.

"Still, however, there seems to remain some room for discus- "sion. A franchise of fowling in the forest has been admitted "as belonging to Mr Innes's neighbouring property, Whether "admitted *per incuriam* (as is said) or not, the existence of it, as "a legal right, has been recognised by the final interlocutor of "this Division, and the Ordinary does not see any reason to "doubt the validity of such a franchise. As the Crown might "create and confer rights of forestry, privileges within these, may "be conferred heritably on adjoining properties. Two questions "therefore, arise; first, Had Mr Farquharson, under his titles "and inveterate possession by gamekeepers (as alleged), a right "to such a franchise? Second, If he had, does not the decree- "arbitral cut it down virtually by the limited sort of rights which "it recognised, although neither the parties, nor the arbiters, "appear to have paid any attention to the rights of hunting and "fowling, and the enjoyment of that right among all the parties, "appears to have remained on the same footing, subsequent to "the decree-arbitral as before it? If the parties incline, the "Ordinary will take the cause to report, with a view to this "point, but he is not disposed to give so much credit to the other "two points, as to extend the report to them also, which, indeed, "he thinks would tend to distract the attention of the Court from "that point, where it appears to him there is any real difficulty."

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"repel the defences, and decern in terms of the libel; and "in the suspension, suspend the letters *simpliciter*, and decern "accordingly, but find no expenses due."

Nov. 16, 1814. On advising another reclaiming petition, the Court adhered.* The cause went back to the Lord Ordinary, on the representation formerly given in against the interlocutor, finding that the franchise of hunting or fowling, was not a

Nov. 25, 1814. Jan. 27, 1815. Feb. 9, 1815. prædial servitude. His Lordship refused two representations on this point. And, on reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought to the House of Lords by the appellant.

Pleaded for the Appellant.—The right of the respondent over the surface of the forest of Birse, is not greater than that of the appellant, and, therefore, is not such as can entitle him to exclude the appellant from any use of the surface which he claims himself. By the ancient titles of the appellant, his right in it is that of common property, and by the decree-arbitral, 1755, the superficial use of the forest is declared to be exhausted by the rights of the parties' submitters, which, so far as regards it, are declared to be equal.

2d, The property in the mines and minerals cannot give any right to the superficial use of the forest, and can only entitle the proprietor of these to exclude all others from the use of the mines and minerals; but cannot entitle him to exclude a person having an equal right with him in the surface, from making a use of that surface which he claims as his own privilege, but from which he seeks to debar the other. Besides, the appellant has, by express grant from the proprietor of the forest, a right of hunting and fowling in this forest; and in a question with any person deriving right subsequently from the proprietor, this grant must be effectual, more especially when, as in this case, prior rights are expressly reserved in the subsequent grant. Nor is it any objection that this express grant only appears in the tenendas clause of his charter, because various important privileges were formerly conveyed in the *tenendas* clause of charters; and these were effectual when contained in charters flowing not from the Crown, but from subjects; more especially if the grant be made for a valuable consideration, as was the case here.

3d, A charter by progress is understood to include every

* For opinions of the judges in the Court of Session, *vide* Fac. Coll., vol. xviii., p. 17.

right and privilege contained in the original charter, unless it be expressly altered; and, therefore, the words *aucupationibus venationibus*, in the modern charters, are just the abbreviated and equivalent form of expression for *aucupationibus et venationibus per forestas de Bras prænominatas et singulas earum partes*.

The appellant is expressly infeft in the barony of Finzean, comprehending, among other lands, Balfadye and Cragbeg, "*cum omnibus et singulis partibus, pendiculis, privilegiis et* "*pertinentiis, omnium dictarum terrarum.*" One of the privileges in which he is thus infeft is, the *privilegium et facultas aucupandi et venandi infra forestas de Birse.*

Pleaded for the Respondent.—1st, The respondent, as being proprietor of the forest, both by his title-deeds and by the express terms of the decree-arbitral of 1755, and being vested also with the office and jurisdiction of forestry, has the only good and exclusive right to hunt and shoot in the forest, unless the appellant can show a joint or common right of property therein, or feudal grant of hunting and fowling proceeding from one, who himself had a legal right to confer such grant.

2d, The appellant has shown no right of joint or common property in the forest. Neither has he shown any express grant of hunting or fowling in any of his titles, ancient or modern. The expression "*cum communitate*," which the appellant would interpret into a common or joint right of property, is well known to mean nothing more than the *servitude* of commonty or common pasturage. And the other clause, "*cum venationibus, aucupationibus*," refers only to hunting and fowling upon the grantee's own lands, not upon the lands of third parties. It is no answer to this to say, that the charter in 1574 of Balfadye and Cragbeg, contains a right to hunting and fowling, not only through these lands, but also "per forestas de Birse," because the mention there of such, seems to have proceeded from mistake, and is inept, it being disconform to the terms of the *resignation*, which does not mention hunting and fowling, and which formed its only warrant, and consequently the clause was not repeated in the subsequent renewal of the investitures of those lands from 1574, down to the present time. But the clause founded on by the appellant in this charter, and in all the other titles to which he refers, appears only in the *tenendas* clause, and, therefore, is wholly incompetent to confer such right over the property of a third party.

Separately, the intention of the arbitration and meaning

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of the decree-arbitral, was to settle every existing right of the parties *inter se*, and it must therefore be held to extinguish the present claim. The more especially so, when it is considered, that by the express terms of that decree it is instructed, that the appellant has a right to certain servitudes over the forest, and nothing more; these being the ordinary servitudes of pasturage, fuel, peat, and divot. The right of hunting or fowling is not a prædial servitude; it has nothing in it analogous to such servitude; neither is it a pertinent of any of the rights specified in the decree-arbitral, as belonging to the appellant.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,*

"This is a case which turns on what is termed the *tenendas* clause in a very ancient charter. The appellant complains that the Court has not given full effect to the claim he makes under this title.

"All the judges of the Court below agree in this, that, in regard to all matters conveyed in a charter, you are to look at the dispositive, and not at the *tenendas* clause; and that if such matters are not included in the dispositive clause, or fall naturally under it *as pars ejusdem rei*, they are not carried to the disponee, by being mentioned in the tenendas clause.

"It appears to be unquestionable, that this is the modern doctrine of the law of Scotland. By modern, I mean the doctrine of the law, as far as the same can be discovered from the books, and writers on the Scotch law.

"Lord Meadowbank, a judge of much research, differed from the other judges. He said, that in very ancient times, rights of property were conveyed by the tenendas clauses of charters, which were not noticed in the dispositive clauses; that usage had followed upon these, and that if you were to apply the modern doctrine of the law to such cases, you might disturb many rights depending upon such charters.

"Many ancient charters were produced, in which it was stated that rights of property were conveyed by the tenendas clause; and it was said that many more such rights might be produced. The natural way of proceeding in a case like this would be to agree, that such was the modern meaning of charters, but to inquire, if such was also the meaning of every ancient charter; and I thought at one time it might be right to remit the cause to see if Lord Meadowbank's doctrine on these ancient charters was well founded or not.

* From Mr Gurney's short-hand notes.

"I take occasion here to say, that I never have been active in remitting questions arising on appeals from Scotland for further consideration from any other cause than this, to seek for further information from those sources from which it may be got.

"I have a disinclination to these remits. I know they are in all cases expensive; I see, too, that they are sometimes misunderstood, and your Lordships will probably have occasion to see before this session concludes, that they are sometimes not very respectfully treated.

"I do not mean that your Lordships should decide this appeal to-day, but that it should stand over till the second cause day after the ensuing recess. I shall, in the meantime, endeavour to obtain information on the point to which I have alluded, when such information can with propriety be asked for.

"If I were to decide to-day, I should move to remit this cause; but I deem it better to adjourn further consideration till the second cause day after Easter, to give time to consider, whether there should be a remit or not."

On 22d April 1818, *Case Resumed.*

"My Lords, your Lordships will recollect, that this is a question as to what is the effect to be given to the mention in the *tenendas* clause of a subject different from the property conveyed by the dispositive clause, and that the judges of the Court of Session, by a large majority (only one individual, indeed, dissenting), thought that a gift only in the *tenendas* clause could not be sustained. A judge, lately dead, of great eminence entertained a doubt, whether there could not be a grant of a separate subject by the *tenendas* clause of an ancient Scottish instrument. I stated to your Lordships, when I last addressed you on this subject, that I should make inquiries into that point; and I have not failed to do so. I do not mean to say that in no case the gift of a subject in the *tenendas* will not enlarge the gift in the dispositive clause; but in this case, it is my opinion, that, laying aside altogether the consideration of the decreet-arbitral (which alone might, perhaps, dispose of the question) the expressions in the tenendas clause could not operate to extend the property conveyed by the dispositive clause.

"This being my opinion, I must move your Lordships to affirm the judgment of the Court below."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Mat. Ross, John Clerk, J. H. Forbes, W. G. Adam.*

For the Respondents, *Sir Saml. Romilly, Thos. W. Baird, Fra. Horner.*

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EARL OF WEMYSS v. EARL OF HADDINGTON, &c.

[Fac. Coll., Vol. xviii., p. 240.]

The Right Hon. FRANCIS CHARTERIS, EARL OF WEMYSS and MARCH, ... *Appellant;*

CHARLES, EARL OF HADDINGTON, and others, Trustees of the deceased Earl of Wemyss, . *Respondents.*

House of Lords, 20th May 1818.

MARRIAGE CONTRACT—JUS CREDITI—PROVISION—SURROGATUM—FIAR ABSOLUTE—LIMITED.—A marriage contract settled on the heir male of the marriage certain lands, besides bank stock, to the amount of £4000. These were afterwards sold by the father; he lived fifty-eight years after this sale. The grandson, who was the heir male of the marriage, made a claim for the value of these lands and bank stock, calculated as at the deceased's death. Held him entitled only to the value received for them at the time they were sold.

The appellant's grandfather, then the Hon. Francis Charteris, by his marriage contract, dated 12th September 1745, entered into with Lady Catherine Gordon, bound and obliged himself, "in contemplation of this marriage, to provide and "secure to himself and the heirs male of this present marriage; "which failing, to the heirs of his body of any subsequent "marriage, which failing, to his nearest heirs and assignees "whatsoever, the lands of Muirfoot and pertinents, and the "lands of Lethenhopes; as also the sum of £4000 sterling, "of capital stock of the Royal Bank of Scotland, and several "other sums of money, extending to the sum of £11,581 "sterling."

The late Lord Elcho, the appellant's father, was the only son of that marriage. Lord Elcho died some years before his father, the Earl of Wemyss, who survived him, and died in the year 1808. After his death the appellant was the heir male of marriage, entitled to take in free property the lands of Muirfoot and Lethenhopes, and the £4000, bank stock, under the express provision of the marriage contract.

But it appeared that, a long time before his death, the Earl of Wemyss had sold the lands of Muirfoot and Lethenhopes, and the bank stock mentioned; and the present action was raised by the appellant against his trustees, concluding either that the deeds of entail subsequently executed by the Earl should be set aside, and the property contained in them held as a *surrogatum pro tanto* of the lands, bank stock, and money which the late Earl became bound to settle by his marriage

contract; or that the value of the latter, as at the death of the Earl, should be paid out of the trust funds, so far as they go, and the balance declared a debt upon the entailed property.

The entail executed by him, of this date, was in regard to the estate of Elcho. There is a clause in it binding the heirs of entail to free and relieve the said lands "of and from the "payment and performance of all the debts and obligements "which he for himself, and as representing his predecessors, "should be liable to." Mar. 27, 1804.

In the trust-deed which was executed of even date, he binds the trustees to "pay and discharge all such lega- "cies, donations, annuities, and *provisions* which I have "already left and bequeathed, or become bound for in favour "of any person whatsoever." Various codicils were added to this trust-deed, which seemed immaterial to the merits of the question, and he executed in 1806 a separate entail as to his house and grounds in Lauriston.

The defences stated to the action were, 1. That there was no ground for reducing the entails, and for holding the lands purchased by him as a surrogatum for these settled by the marriage contract. 2. That the claim of the appellant under the contract of marriage, could not extend further than to the price actually received by the late Earl of Wemyss for the lands and other property settled by the contract, under the deduction of the debts affecting those subjects. 3d. That before the appellant could insist in this action, he was bound judicially to renounce the benefit which he might eventually derive from the deeds of entail executed by the late Earl.

The appellant ultimately limited his claim to the *value* of the property settled by the marriage contract *as at the late Earl's death.*

The Lord Ordinary ordered informations in order to report the case to the Court. When reported, there was a difference of opinion on the part of the judges, and the cause was ordered to stand over for a full bench. And, afterwards, their Lordships ordered counsel to be heard upon the following question:—"Whether the pursuer, under the second "alternative conclusion of the libel, is entitled to claim the "valne of the estates sold by the late Earl of Wemyss, as at "the date of the said Earl's decease, or only as at the dates "of the respective sales of the same?" Feb. 26, 1814.

The cause having been thereafter heard on this question, their Lordships pronounced this interlocutor:—"Find that "the claim of the pursuer, as a just and lawful creditor to Mar. 28, 1815.

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"the deceased Earl of Wemyss, under the contract of marriage libelled on, extends to the amount of the prices "received for the lands of Muirfoot and Lethenhopes, and "for the bank stock, together with the sums of money "settled by the said contract, but no farther; remit to the "Lord Ordinary to proceed accordingly; and, *quoad ultra*, "sustain the defences, assoilzie the defenders, and decern."

Against the above interlocutor, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The marriage-contract in this case constituted a legal obligation, binding the late Earl of Wemyss to provide *cum effectu*, that the heir male of marriage, *i.e.*, appellant should, on his death, succeed as heir of provision to the lands of Muirfoot and Lethenhopes, and £4000 stock of the Royal Bank of Scotland, as well as the sums of money mentioned in the contract, from which obligation there arose a corresponding *jus crediti* in favour of the appellant.

Such is generally the effect, by the law of Scotland, of an obligation in a contract of marriage, to provide lands or other subjects to the heirs of the marriage. It has been said that anciently such obligations only bound the contracting party to settle *once*, by executing an instrument containing a simple destination alterable at his pleasure; but it is not easy to believe that contracts, onerous in their nature, could ever have in practice, received an interpretation which, in truth, made them nugatory. But if such was ever the law, it has long ceased to have authority for such contracts, as now interpreted, give the heir a *jus crediti* against the husband or his representatives, entitling him to implement of the contract.

The claim of the appellant once admitted, there can be no legal principle for limiting it to the price received by the late Earl of Wemyss, but ought to be extended to the value at the time of his death, when the appellant was entitled to succeed.

Pleaded for the Respondents.—A simple destination, even in a marriage contract, does not vest in the heir any proper *jus crediti*, but only a right of succession liable to be defeated by the onerous or rational acts of the father, and only supported against his gratuitous deeds, and as giving a claim for the price of the subjects when sold, upon principles of equity, and in contradiction to the general rules of law, and to the original practice even with regard to contracts of this description. 2d, The father, notwithstanding such a destination, has a clear and undeniable right to sell the lands so destined, both as being himself the sole fiar and proprietor thereof, and

as administrator, with powers unlimited and uncontrollable, for the heir, for his other children, and for himself; and because it is contrary to all principle and precedent, to subject any person in damages, or to make him answer in his separate estate, for doing that which he had a complete right to do, both in justice and in law. The lands being placed, by the sale, beyond the control of the parties, it is the value they then brought, not that which they might have possessed at the death of the late Earl, that the appellant is entitled to.

After hearing counsel,

THE LORD CHANCELLOR said,*

"I shall state my view of this case very shortly. Looking into the case with great attention, and having regard to the marriage-contract which is the foundation of the claim, I offer my opinion that the law of Scotland has been rightly applied by the judgment appealed from to such a marriage contract as this, and, therefore, that the judgment ought to be affirmed."

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun, Fra. Horner, J. H. Mackenzie.*

For the Respondents, *Alex. Maconochie, F. Jeffrey.*

[Fac. Coll. Vol. xviii. p. 362.]

JOHN THOMSON, Writer in Jedburgh, . *Appellant;*

Dr WM. SOMMERVILLE, Deputy-Inspector of Army Hospitals, . . . *Respondent.*

House of Lords, 8th June 1818.

DAMAGES—SERVICE—MALA FIDES IN OPPOSING DO.—PRESUMPTION OF LIFE OR DEATH—FACTORY.—The respondent's wife was next heir to the estate of Knowsouth, belonging to her brother, a Lieutenant in the navy. Word was sent home by the officers of his ship, that being under arrest to stand trial, he had dropped overboard to escape to land, and was believed to have been drowned. The appellant, a writer, was married to a Miss Rutherfoord, who was entitled to succeed to the estate, failing the respondent's wife. He was also factor for the deceased brother in managing the estate. He accepted of a mandate from the respondent's wife, who was the next heir, to make up her titles to the estate. He had also made out the respondent's marriage contract, by which his wife left the

* From Mr Gurney's Short-hand Notes.

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respondent in, in the event of her predeceasing, the liferent of this estate. Action was raised by him for damages and indemnification against the appellant, and John Rutherfoord, for entering into a fraudulent conspiracy or compact to obstruct and oppose his wife's service, while she was dangerously ill by delays devised to defeat the purpose of the service; whereby (his wife having died) he was deprived of his liferent of the estate, provided to him by his marriage contract. Held him entitled to damages to the extent of the rents of the estate, from Mrs Sommerville's death, and found him also entitled to the liferent thereof, during his life. Reversed in the House of Lords.

The estate of Knowsouth, situated in Roxburghshire, was vested in John Rutherfoord, under a destination in his marriage contract, in favour of the heirs male of his body, whom failing, in favour of heirs female, "the eldest always having "preference, and succeeding without division."

John Rutherfoord left four children, two sons and two daughters. Thomas succeeded to the estate; John was in His Majesty's navy; Jean, one of the daughters, was married to Mr Scott, and the other daughter to the appellant.

Thomas Rutherfoord, after succeeding to the estate, executed a conveyance to himself in liferent, and to his son John, his heirs and assignees, in fee, and upon this conveyance, his son John took infeftment. Upon John's death, without issue, he was succeeded by his brother George, then a Lieutenant in the Royal Navy. Upon his death, his sister, Miss Rutherfoord (who was married to the respondent), was entitled to succeed to the estate.

His death, in 1806, had been reported by Admiral Elliot and Lord Minto, acquaintances of the family, under the following circumstances. While in charge of His Majesty's ship "Trident," in the East India station, he had sentenced certain seamen to an illegal punishment, namely, "flogging and run-"ning the gauntlet," which resulted in their death; and when he came home with his ship, he was arrested and removed from his ship to the flag-ship at Plymouth on this charge; but the night before the officer arrived to take him into custody for trial, he dropt from the quarter gallery into the sea, evidently with a view to escape, but as the weather, it was said, was tempestuous and extremely cold, he was generally believed to have perished.

Upon the most minute inquiries on the part of the sister, the general belief was that Lieut. George Rutherfoord was drowned.

She married Dr Sommerville, the respondent, and by the

marriage settlement, the respondent was secured in the event of her predecease, in the liferent right of the estate.

In proceeding to serve his wife heir to her brother, opposition was experienced from the appellant; upon doubts insiduously suggested as to the truth of the reports of the death of Lieut. George Rutherfoord. It was believed by some, that as he had stripped himself to swim, that he had got off in a wherry there ready to pick him up. This idea was supported by a reward having been offered by the Admiralty for his detection at the time. This contradictory statement led to the delay of the service.

John Thomson, the appellant, it appeared had a factory in his favour, to manage the estate in Lieut. Rutherfoord's absence. But it also appeared, notwithstanding this factory, that he had drawn out the marriage contract between the respondent and his wife, containing obligations under which she came bound to give a liferent to the respondent on his survivance. He also, as their agent, had accepted of a mandate authorizing him to make up her titles to the estate. Notwithstanding all this, he thought it his duty to take steps to delay, if not to oppose, the service. But before doing so, it appeared that he had laid a memorial, in name of the next of blood entitled to succeed after Mrs Sommerville, for opinion before Mr Blair, then Dean of Faculty, upon the following queries, 1st, Whether the memorialist was entitled to appear in her service, as her legal contradictor, on account of the uncertainty which still existed in regard to the death of her brother?

2d, Whether the appellant, as the legally appointed factor of Lieutenant Rutherfoord, was entitled to appear?

3d, Whether the *onus* of proving his death, rested on the claimant or contradictor?

4th, What was the most regular and proper means of ascertaining, by judicial investigation, whether Lieutenant Rutherfoord be dead or alive?

Mr Blair's opinion was not obtained in writing; but it was stated by the appellant that he appeared as counsel for the appellant in the service, and asserted his right and duty as factor for Lieutenant Rutherfoord, to be heard upon the merits of that service.

It was also stated that the other appellant, Captain John Rutherfoord, who was entitled to succeed after the death of Mrs Sommerville, joined with the appellant in opposing the service; and this they did at a time when they knew that Mrs Sommerville was in extreme danger of her life.

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A commission was issued to take the evidence of the officers on board the ship, and others, as to Lieutenant Rutherfoord's death. Afterwards, the appellant's title to appear before the macers in the service, was sustained by the Lords Assessors, after a full argument. The commission was delayed, it was said, by the interference of the appellant; and in the midst of all those proceedings, and while the commission and proof were about commencing, the whole was put a stop to by Mrs Sommerville's death.

The respondent then brought the present action against the present appellant, and also against Captain Rutherfoord, who stands appellant on a separate appeal, to hold them liable in the loss, and to indemnify him for the consequences of opposing the service of his deceased wife, whereby he was prevented from enjoying the liferent of the estate provided to him by their contract of marriage, because they, "*from selfish and improper motives*," and with a view to deprive the pursuer and his wife of their just and legal rights, did *mala fide* oppose the service of the said Ann Rutherfoord, thereby to defeat the same, and entered into an illegal and fraudulent concert to obstruct the said service, and to oppose the same.

Vide next Appeal.

A condescendence was ordered and answered, and a proof taken; and upon this being reported the Court pronounced this interlocutor: "Find that the factory held by the de-
"fender, Thomson, from the late Lieut. Rutherfoord, was
"limited in its nature, and did not give him any authority
"and title to oppose the service of the late Mrs Sommerville,
"as heir in special to her brother, John Rutherfoord, who
"died last vest and seized in the estate of Knowsouth:
"Find further, that the defender, Thomson, by accepting of
"the employment of the late Mrs Sommerville, and writing
"her contract of marriage, in which she came under obliga-
"tions, as proprietrix of the estate of Knowsouth, and accept-
"ing a mandate from her to complete her titles to said estate,
"did thereby virtually abandon the said factory, and was
"thereafter not entitled to recur to it, and use it to her pre-
"judice: Find, that both the defenders did enter into an
"illegal and fraudulent concert to obstruct, oppose, and delay
"the service of the late Mrs Sommerville, as heir in special
"to the late John Rutherfoord, in the said lands of Know-
"south, at a time when they knew that the said Mrs Som-
"merville was in extreme danger of her life, and when delay
"might entirely defeat the purpose of the service: Find that
"the said defenders had no probable grounds for *bonâ fide*

June 23, 1813.

"believing that Lieut. Rutherfoord was still in life, and that "this pretence of opposition was assumed by them to cover "their own unlawful purpose of securing the estate to themselves, disencumbered of the liferent provided to the pursuer by his contract of marriage with Mrs Sommerville: "Find that the service of the late Mrs Sommerville was "delayed and defeated by the said illegal opposition maintained by the said defenders, and that the pursuer was "thereby prevented from entering on the liferent of the said "estate on the death of his wife: Find that the brief of inquest is not a pleadable brief, and that every objection "thereto (bastardy excepted) stated even by a person having "a legal title and interest to oppose a service, must be "proved *instanter*, unless he has himself a counter-brief for "serving himself heir, or shows a special right to the subject: "Find, that it was therefore incompetent and illegal for the "said defender, Thomson, to demand a term for providing, "and that, in making said demand, he acted *suo periculo*, "and must be answerable for the consequences, and the "more especially, as his opposition was without a legal title "or interest, and originated in a fraudulent intention and "combination to injure the pursuer: Therefore, find the "said defenders, conjunctly and severally, liable in damages "to the pursuer; modify the same to the free rents and "profits of the lands and estate of Knowsouth, from and "after the day of Mrs Sommerville's death, to the date hereof; "and decern and ordain the defenders conjunctly and severally to hold count and reckoning with the pursuer for the "same: Further, find and declare, that the pursuer is entitled "to the liferent of the said lands and estate during his life, "from and after the date hereof, in terms of the contract of "marriage between him and the late Mrs Sommerville, and "decern against the defender, John Rutherfoord, in terms of "the leading conclusion of the libel against him, towards "the formal establishment of such right of liferent in the "pursuer's person, according to the true intent of the said "contract of marriage: Remit this process to the Lord "Ordinary (Reston) to proceed and to do farther therein, in "terms of this interlocutor: Find the said defenders, "conjunctly and severally, liable in the expenses of process; allow an account thereof to be lodged, and remit "the same when lodged to the auditor of Court to tax and "report."

May 19, 1815.

On reclaiming petitions to the Court, the Court adhered. June 2, 1815. June 8, 1815.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The charge of *mala fides*, is unsupported by legal evidence, and is altogether false; and the Court below proceeded on the principle of assuming *mala fides* as a necessary ingredient in awarding damages, but have judged erroneously in holding that *mala fides* has been proved. There is no proof of dole, or of circumstances from which it can be legally deduced At first, no doubt, the appellant proceeded on the faith of the information received from Admiral Elliot and Lord Minto as to George Rutherfoord's death, and had no hesitation then of accepting the respondent's employment in the matters referred to; but it is a total fiction to say, that when he learned the precarious state of Mrs Sommerville's health, that he did all in his power, in fraudulent concert with the other defender, to obstruct and delay the service. The delay arose entirely independent of this circumstance; and from information received from the same sources as formerly of rumours existing, that George Rutherfoord had succeeded in getting to shore without being drowned, and that he had got off to America. 2d, In his whole proceedings as *factor* for George Rutherfoord he was governed by a conscientious sense of duty to his absent constituent, and he acted according to the advice of eminent counsel, and with no "fraudulent intention to injure the pursuer."

Pleaded for the Respondent.—The measures adopted and pursued for delaying and stopping the service, were the joint acts of Captain Rutherfoord and Mr Thomson. They originated in a preconceived plan of defeating the respondent's right of liferent, suggested by the desperate state of Mrs Sommerville's health, and they were carried out deliberately on the principle of accomplishing the object by delay, obtained by means of the most false and colourable pretences. 2d, The service and infeftment of Mrs Sommerville and the respondent's right, which depended on them, were defeated by the appellants. 3d, He who unwarrantably interferes to stop or delay a service, is liable in damages to the party, the legal establishment of whose right is thereby prevented. Neither Captain Rutherfoord nor Mr Thomson had any legal title to appear in the service; the opposition having been made without a legal title or interest was necessarily made at their peril. Even if there had been a sufficient title and interest, no person was entitled so to interfere, without being

prepared to verify his objections instanter; and it was contrary to law, to demand terms for proving.

After hearing counsel,

It was ordered and adjudged that the interlocutors therein complained of, be and the same are hereby reversed; and that the defender be assoilzed.

For the Appellant, *Mr Thomson, John Leach, William Erskine.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff.*

NOTE.—Unreported in the Court of Session.

JOHN RUTHERFOORD, Esq., . . . *Appellant;*

Dr WM. SOMMERVILLE, Deputy Inspector of Army Hospitals, ... *Respondent.*

House of Lords, 8th June 1818.

This was the separate appeal, alluded to in the preceding case, taken by the other defender, John Rutherfoord; but as it arose out of the same circumstances, and the same action and judgment pronounced in the Court below, it is unnecessary to detail these here.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby reversed, and that the defender be assoilzed.

For the Appellant, *Geo. Gos. Bell, Geo. Cranstoun.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff, Henry Cockburn.*

NOTE.—Unreported in the Court of Session.

JAMES OCHTERLONY LOCKHART MURE, Esq. of Livingstone, a Minor, and Mrs HENRIETTA MORRES, his sole Curatrix, } *Appellants;*

JOHN RAE MURE and Mrs MARION LOCKHART, Spouse of John Smith, residing at Gatehouse of Fleet, the son and daughter of Mrs Jean Mure, late of Livingstone, } *Respondents.*

House of Lords, 9th June 1818.

DEATHBED—CANCELLED DEED.—Power was given by an entail

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to the heirs of entail, to provide their younger children with provisions, and to affect the estate with the same, equal to three years' rents. The respondents' mother granted bond to them, her younger children, and affected the estate with payment of the same. She died four years thereafter. While on deathbed she had executed a second bond, in precisely the same terms as the former, only giving the heir a longer time to pay. The previous deed was at same time cancelled. The heir of entail challenged the deed executed on deathbed. (1) Held that it was competent to look at the first deed, in order to support the second, as there was no evidence that Niven had authority to cancel the first in the way he did; and, therefore, that the second deed was not reducible, on deathbed, and not prejudicial, but more favourable to the heir. (2) Held, that she had no separate estate out of which to provide for the younger children.

In 1754, Robert Mure, Esq. of Livingstone, executed a strict entail of the said estate and others, in favour of Adam Mure, his only son, and the heirs of his body; whom failing, in favour of his daughter, Mrs Jean Mure, and the heirs of her body.

By this entail, power and liberty was given "to the said "Adam Mure, and to the other heirs of tailzie above men- "tioned, in case they have no other separate estate, real or "personal, than the lands and barony and others above dis- "poned, to provide their younger children with such pro- "visions as they shall think proper, not exceeding three "years' rents of the estate," &c.

Adam Mure succeeded to the estate after the death of his father, the maker of this entail; and upon his death without issue, Mrs Jean Mure, his sister, succeeded as next heir of tailzie.

She was twice married, having issue of both marriages.

In 1805 she executed a bond of provision in favour of the respondent John Rae Mure, her son, and Mrs Marion Lockhart, his sister-uterine, her only surviving younger children, burdening the estate with a provision equal to and not exceeding three years' rent of the estate.

She died on 18th May 1809, and the only document found in her repositories after her death, in the way of a settlement, was a bond of provision in favour of the said John Rae Mure, and her daughter, Mrs Marion Lockhart, dated seventeen days before her death, and purporting to be of the precise same tenor and contents as the former bond of provision, only giving the heir in possession of the estates a longer time to pay it, namely, five years instead of three years after her death.

In executing this last bond and deed of settlement it was alleged that she had given instructions to her agent to cancel the previous deed; and that after he went home, he cancelled it accordingly, by tearing away her name from the deed.

The appellant, the heir of entail succeeding to the estate, brought a reduction of the bond of provision, in so far as it burdened the entailed estate on the ground:—1st, That having a separate real estate, she had no power so to burden; and, 2d, That the said bond and assignation was granted by the said Mrs Jean Mure in favour of the defenders on deathbed, to the prejudice of the appellant as heir of entail.

In defence to the action it was pleaded:—1st, That Mrs Jean Mure at the time of her death, or at the time of making the above deed was not possessed of any real or personal estate of her own, that could bar exercising the power allowed by the entail to provide for younger children; and, 2d, That the pursuer (appellant) had *no interest* to pursue the present reduction, because, that the said Mrs Jean Mure, had exercised the faculty of providing for her younger children by a bond of provision executed by her in *liege poustie*, and that the said bond of provision was a subsisting deed, when she executed the bond of provision now sought to be reduced, and stood at her death, and still stands, "unrevoked; "and, therefore, the bond of provision now sought to be "reduced, being of the same tenor as the previous bond, "excepting as to the term of payment, cannot be set aside as "granted *in lecto* to the prejudice of the grantor's heir, but "was for his benefit."

A diligence and warrant was granted for the recovery of the former bond of provision, which it appeared was in the hands of Mr James Niven, the writer who drew it out, and who had also been sent for to execute the second bond of provision before her death.

Having been cited as a haver, James Niven appeared and deponed as follows: "Deponed and exhibited an assignation "and bond of provision made by the late Mrs Jean Mure of "Livingstone, in favour of John Rae, her second son, and "Mrs Marion Lockhart, her daughter, dated the 10th day of "September 1805 years: That the said assignation and bond "of provision was not now in the same state in which it had "been when the deponent received it from the said Mrs Jean "Mure; that was to say, it was now cancelled, and it had "been an existing deed when he received it from Mrs Jean "Mure: That he received it from her upon the 1st day of

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"May last; and being interrogated, at what time of the day "he so received it, and whether, previous thereto, he received "a notice from Mrs Mure, intimating that she had been "taken suddenly ill, and expressing an anxious wish to see "him; depones, That he received a message from the said "Mrs Jean Mure on Sunday, the 30th day of April last, "desiring him to come and speak to her: That he went ac- "cordingly, when she informed him that she had fallen twice, "and that she was afraid of herself; and she mentioned her "anxious desire, that the deponent should not go out of "town on the next day, namely, Monday the 1st day of "May last, because she wanted him to make out a new bond "of provision and assignation in favour of her son and "daughter, making the provisions payable to them by instal- "ments, in five years instead of three years, as provided by "the assignation and bond formerly executed and now pro- "duced: That on Monday morning before breakfast, the "deponent waited on the said Mrs Jean Mure, and she went "up stairs with him to her drawing room, and took out the "said assignation and bond of provision from a drawer, con- "taining linens, and delivered it to the deponent, and desired "him to cancel it, and to make out a new assignation and "bond of provision in the terms communed on the preceding "day: That the deponent, accordingly, made out a new "bond of assignation, and had it executed upon the said 1st "day of May last; and immediately after it was executed in "Mrs Jean Mure's house, he, in pursuance of her directions, "cancelled the former assignation and bond, by cutting or "tearing her subscription from the first and third pages of "the deed in the manner in which it now appears; and he "so cancelled the deed in his own office, after he returned "from Mrs Mure's house, for he had left it in his office when "he went to Mrs Mure's house to get the new bond and as- "signation executed: That he did not think that any person "was present when he received Mrs Mure's directions to "make out the new bond and assignation, and to cancel the "former one; and he did not think that Mrs Mure gave any "orders for cancelling the former assignation and bond of "provision, in presence of the instrumentary witnesses to the "execution of the new one; and which assignation and bond "now exhibited were marked and signed, of this date, by the "deponent, commissioner, and clerk as relative hereto."

Nov. 13, 1810. The Lord Ordinary pronounced this interlocutor:—"In "respect that the deed alleged to have been executed on

"deathbed, was only explanatory of the prior deed of pro-
"vision, and was not to the prejudice of the heir, but for his
"benefit, in as much as it gave him five years to pay the
"provisions to the younger children, whereas these were
"payable to them in three years by the prior deed, sustains
"the defences and decerns."

On representations being presented, his Lordship pronounced this interlocutor:—"Conceiving the case of Coutts June 19, 1811.
"founded on by the pursuer, is materially different in its
"circumstances from the present, where the two deeds of pro-
"vision are in favour of the same persons, and the first of
"which was not cancelled till the second explanatory deed
"was executed, adheres to the interlocutor represented against,
"so far as regards the challenge on the head of deathbed;
"and with respect to the other objection, made to the pro-
"vision of separate funds, out of which her younger children
"may be provided: Finds that the pursuer has not yet suf-
"ficiently instructed the facts upon which it is founded, and
"therefore, repel the same *in hoc statu*, assoilzies the defenders,
"and decerns."

On reclaiming petition to the whole Lords of the First Division, the Court pronounced this interlocutor:—"The
"Lords adhere to the Lord Ordinary's interlocutors reclaimed
"against, so far as relates to the reason of reduction, founded Feb. 8 and 12, 1812.
"on Mrs Mure's alleged possession of a separate fund, out
"of which to provide the younger children, and so far refuse
"the prayer of the said petition; but *alter* the said inter-
"locutors, so far as they sustain the defences against the
"challenge of the bond of provision and assignation libelled
"on the head of deathbed; sustain the reason of reduction
"of the said bond of provision and assignation, that the same
"was granted upon deathbed; repel the defences on that
"head, and reduce, decern, and declare in terms of the
"conclusions of the libel accordingly."*

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* Opinions of the Judges:—

Advising, 8*th and* 12*th February* 1812.

Lord Craig.—"The question is difficult; but I incline to alter. The last deed by itself cannot stand. Can it be supported by reference to the cancelled deed? I think not, because it lies on our table cancelled. It is no deed, and cannot be regarded. This may be hard, but it cannot be helped. As to the alleged irregularity of the agent, and want of authority to cancel, we

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Another reclaiming petition was given in, upon advising which, and hearing parties, this interlocutor was pronounced: "The Lords having resumed consideration of this petition, "and advised the same, with answers thereto, they were "equally divided in opinion, and, therefore, they supersede "further advising, for the opinion of Lord Armadale, the "senior Ordinary." Thereafter, "The Lords having ad- Jan. 14, 1813. "vised the petition, with answers (Lord Armadale, the "senior Lord Ordinary, having been called in), they alter

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have no evidence on that head at present before us. All we see is, a cancelled deed, which we cannot look into, till re-established."

LORD BANNATYNE.—"I find great difficulty in the case. If the deed be regularly and by authority cancelled, we cannot regard it. But I wish to delay deciding on that point, till the issue of a proving of the tenor for restoring the deed."

LORD SUCCOTH.—"It is certainly a difficult question, yet on the whole I incline to adhere. (Here his Lordship commented on the difference between this case and Coutts.) In the case of Coutts, the clause of revocation was very peculiar. Accordingly, it was *not* followed in the case of Lang *v.* Whytlaw (1809), which latter case is like this, and a precedent that touches it. I see no difference between a revoked and a cancelled deed."

Vide ante, vol. v. p. 73.

Ross' Land Rights, vol. i., p. 674; *et* Shaw's App. Cas., vol. ii., (note) p. 13.

LORD PRESIDENT HOPE.—"This is a good petition of Mr Blackwell. I cannot support this deed. All we see is a cancelled deed, and cancelled by authority, according to the only evidence we have, namely, that of Niven. We *must* believe him if we *look* into the evidence at all. If we dont look into it, all we see is a cancelled deed. Now we cannot look at that deed. We cannot *read* it, or *know* what is in it, or whether it was in favour of the heir at law, or to his prejudice on that head. If the former deed had been cancelled, it could not be attended to at all; there was in the House of Lords, in the Coutts' case, no doubt at all. The principle in Coutts' case was, that the heir's challenge can only be excluded by production of a *prior existing deed*, which excludes him, if the last deed be reduced. Whytlaw's case was a case of construction, not of deathbed—it is not applicable here; and in Coutts' case, the clause of revocation was so peculiarly constructed, that the prior deed could not be viewed as a subsisting deed to exclude the heir, being simply revoked, except to the effect of supporting the late deed."

LORD BANNATYNE.—"If we are to decide upon the deeds as they lie at present on the table, I must be for altering."

For Altering.—Lords President, Craig, and Bannatyne.

For Adhering.—Lords Hermand and Succoth.

Hume's Coll. Session Papers, vol. cxiv.

" their former interlocutor reclaimed against; repel the reason " of reduction libelled on the head of deathbed; sustain the " defences; assoilzie the defenders, and decern: Find the " defenders entitled to their expenses, and the pursuers liable " in the same; appoint an account thereof to be lodged, and " remit the same, when lodged, to the auditor of Court to tax " and report."*

* Opinions of the Judges:—

Advising, 12th January 1818.

LORD PRESIDENT (HOPE), said—" I am clear to adhere. That the deed is blundered is no argument. Every transaction will, or will not have effect according as it is, or is not duly executed.

" If we reject Niven's evidence as to the mode of cancellation, the case is so much the worse for the petitioner. Farther, we have just the deed on our table cancelled, and no evidence how or when it came to be so. Must it then be presumed that the granter herself, with her own hand, cancelled it? If so, then when cancelled it was no deed. That was laid down by the Court in the Crawfordland case, and that we did a wrong in looking into it. But, *de jure*, we cannot look into the deed in this case. Where a deed is revoked only, it may be looked into, because it is still an entire writing; but here there is no existing deed. Suppose the deed had been burned, would we have raised it up in that case? Are we to sustain where the deed is cancelled in one way, and not in the other?"

LORD GILLIES.—" May we not look at the first deed here, by way of explanation of the last deed, not as recognizing it to be an effectual settlement, but to satisfy our minds? It is said, that the first deed was cancelled, but this leads to the question, whether it was so cancelled by authority, or not? Suppose the first deed had been expressly revoked, it would have brought into this case, the question which occurred in the case of Whytlaw. In that case, the Court inquired *quo animo*, was the deed revoked? Here the *animus* is clear, only to cancel the first in case the second was effectual. If her man of business had told her, that the second deed would not be effectual, unless she lived sixty days, her answer would have been, Then don't cancel the first till the sixty days have run.

" The case of Coutts does not interfere with my interpretation; for there the deeds were in favour of *different* persons. The revocation here is *qualified* just as much as if in the case of Coutts it had been declared, that the deed of revocation was not to have any effect, unless it was effectual, in making the first deed revive. The question, perhaps, might have been different, if she had cancelled the deed herself, but that is not the fact here."

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On a further reclaiming petition they finally adhered to the above interlocutor.*

LORD BALMUTO.—"The two deeds are the same, except that more time was given to the heir to pay the provisions."

LORD BALGRAY.—"I am for the interlocutor. We are not at liberty to look back to the cancelled deed at all. It is a nonentity. I feel, indeed, some difficulty upon the fact, whether the deed was cancelled by her authority, or whether the *animus* of the lady at cancelling it was explained to the man of business. There should be further evidence as to this."

LORD HERMAND.—"I cannot shut my eyes to the cancelled deed, supported by the clear intention of the party. The second deed was favourable to the heir, and he cannot, therefore, found on the law of deathbed, for the deed was not to his *prejudice*. At all events, we should have Niven and Smith examined as witnesses, as to *the authority*, and the direction for the cancellation."

Campbell's Session Papers, vol. cli.

* Opinions of the Judges:—

Advising, 1*st June* 1813.

LORD BALGRAY.—"If I were to deal as arbiter, I would be for the interlocutor. But as a judge I must take the principle of law, which says, that a deed falls if *executed* within sixty days. Law creates a right in the heir to challenge; now, are we to refuse to apply it? *When* the purpose of executing the deed was first conceived is of no moment, the date of the execution is alone material. *When* it was cancelled, or by what authority we have not, at present, *evidence* before us. If proof be given that the deed was unwarrantably or irregularly cancelled, it may be restored. I am, therefore, for allowing a proof, and inquiring into these circumstances. But, *at present*, if we are to judge, I am against the interlocutor, having no proper evidence of the irregular cancellation."

LORD GILLIES.—"I see nothing in the principles of law against this interlocutor. We are entitled to inquire into the authority and circumstances of the cancellation. *That* does not *more* do away with a deed than *revocation* does. Yet, in Whytlaw's case, we inquired into the *animus* of revocation, and sustained the deed. Just so here. Niven's evidence shows that there was *no animus* to recall this burden. The case of Coutts is an illustration on the *other* side; for there, too, the purpose of revocation was cleared up, and there was no party to claim in whose favour there was a *liege poustie* will. What I look to, is this, that here, at no one point of time did this lady *will* in favour of the heir. She never meant to die intestate as to this matter. If she had cancelled this deed a twelvemonth before, and so re-

Against these interlocutors the present appeal was brought by the pursuer to the House of Lords.

Pleaded for the Appellants.—1st, Mrs Jean Mure had a separate real and personal estate, and consequently under the conditions set forth in the entail of Livingstone, she was not entitled to burden that estate with provisions in favour of younger children. She was only authorized to do so, if she possessed no other real or personal estate. 2d, By the law of deathbed the deed of provision is null and void. It was a deed purporting to affect the entailed estate and the heir of entail, and being executed on deathbed, must be deemed as invalid and ineffectual. Nor is it of any consequence

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mained for a time, that would have been a quite different case. The right of the heir would have revived. But here it could not —the cancellation being attended with the instant execution of another deed, and for the purpose of making way for it."

Lord Succoth.—"I am for adhering. This is not like the case of Coutts; because, here the grantee of *both* deeds was the same, and the latter deed *more* in the heir's favour. Also, Whytlaw's case is in point, for the second deed was there expressly found good as a *revocation*, and yet, as to the widow's interest, the deathbed deed was sustained; and in that opinion President Blair concurred. I don't see any material distinction between cancellation and revocation. The one annuls equally as well as the other. Nay, sometimes cancellation may be equivocal. There may be doubts as to the authority—of the purpose—whether it was accidental or wilful, and so forth, which in a deed of revocation are always cleared away under the hand of the party. Niven's evidence here shows that she had no *animus* to relieve the heir. If he had stated the law of sixty days, and asked her, Shall I cancel till the end of the sixty days? no one can doubt that she would have answered in the negative. I say more, it was Niven's duty to do so, as a man of business, and his whole conduct in the matter has been rash and unbusinesslike."

Lord Hermand.—"I am clear for adhering. The purpose of burdening the heir was not one taken up within the sixty days. It existed and had been executed before. The only purpose conceived within the sixty days, was one in favour of the heir, which he cannot object to. Niven's conduct was, no doubt, exceptionable. The old deed existed after execution of the new, and was only cancelled after his return home out of the presence of the party, and on no order given at that time."

Lord President (Hope).—"My opinion against the interlocutor remains unaltered; but I assigned the grounds of it formerly, and need not repeat them."

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whether the prejudice done to the heir is by a deed which directly *alienates* or only *burdens* the estate to which he was entitled to succeed. And it is impossible, as is attempted in this case, to connect this deathbed deed with a former bond of provision, executed in *liege poustie*, which is cancelled, so as to raise it by such connection into the character of a deed executed in *liege poustie*.

Pleaded for the Respondents.—1st, The deceased Mrs Jean Mure had no separate estate, and complete evidence of this has been adduced. 2d, There is also complete evidence to show that the bond, which is the subject of reduction, was not a deathbed deed upon the part of the deceased, but one made in *liege poustie*, and not altered as long as she lived. 3d, It coincides with the previous bond in 1805, which the deceased delivered entire into *Mr Niven's* hands, without any instructions to cancel, and which, therefore, must be held to be a subsisting document.

After hearing counsel,

THE LORD CHANCELLOR ELDON said—

"My Lords,*

"I have been extremely anxious to form an opinion so as to enable me to advise your Lordships to decide this cause. It would require no consideration for this, if I could move your Lordships to affirm; but unless the facts of the case were altered it would be very difficult to sustain the judgment. In this view it may be necessary to remit the cause.

"The question is of this nature: a lady, had by a sealed deed not made on deathbead, burdened her estate (as she had power to do) by charging the heir with three years' rents. She afterwards, on a change taking place of the person who was to succeed to the estate, thought an alteration necessary, and she sent for a writer,—a Mr Niven, and intimated to him, that she was ill, having fallen twice, and she directed him to cancel the first bond, and prepare another, the only alteration in which, was to be, that instead of the burden on the estate being payable in three years, it should be payable in five. Mr Niven prepared the deed, and after its execution, he went home (and as he says, by her desire), he cancelled the bond by tearing the name from the first and last pages. Unfortunately the lady did not live sixty days, and the deathbed deed was good for nothing, unless it could be sustained by the former bond. And the question is, whether the instrument cancelled is such an instrument as can be raised up in protection of the instrument made *in articulo mortis*.

* Taken from Mr Gurney's Short-hand Notes.

"Your Lordships know, that by the law of Scotland, if a person make a deed in *liege poustie*, and a different deed *in articulo mortis*, both excluding the heir, if the first of these subsists—as nobody can challenge the right of the person who takes under the deed *in articulo mortis*, but the heir, and as he is cut off by the former deed—he has no interest to challenge it, and it would be affirmed; but the difficulty in this case is, how the first deed, *actually cancelled*, can be set up?

(His Lordship then referred to the practice in English cases.) "If a person, having executed a first, gives directions for the execution of a second will, and does not succeed in completing the second, our law holds the first as not cancelled. The difficulty in this case is to say, that the first can operate to set up the second. In England it is the first deed which we set up, in Scotland it is the second.

"Some of the cases quoted are so strong that their decision goes to destroy their authority altogether. I cannot see, having regard to the decision in the case of Coutts *v.* Crawfurd, that any distinction is to be taken when the second deed only makes an alteration on the first, or is in favour of strangers. What are the facts in this case? Niven was summoned as a haver (as the law of Scotland terms a person called on to produce papers), and he produced the first instrument indorsed, '*Cancelled, May,*' and with the subcription torn from two pages, and says that Mrs Mure directed him to cancel it when she directed him to make the other. Some facts of the case seem to import that Niven must have understood her not to mean him to cancel the first till the second took effect. If the author of the second did not authorize him to cancel the first till she had provided herself with a good effectual second deed, *his* cancelling would not amount to *her* cancelling. And there was an offer of proof in the Court below, that Niven had declared to two persons, that he had no directions to cancel. I propose to your Lordships to take till after Easter to decide, whether it would be proper to remit, with a view to come to a farther knowledge of the facts."

On resuming consideration of the case, his Lordship proposed judgment as follows:—

Journals of the House of Lords.

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the interlocutors complained of in the said appeal, as far as they relate to the reason of reduction founded on Mrs Mure's alleged possession of a separate fund be, and the same are hereby affirmed. And it is further ordered, that, with this affirmance, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors com-

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plained of generally, in other respects with liberty to either party to apply to the Court, and to propose the further examination of James Niven as a witness, and the examination of any other person or persons as a witness or witnesses, to ascertain precisely what directions were given by Mrs Mure, as to cancelling the deed of 10th December 1805, and the true intent and meaning of such directions, and in case the Court shall think proper to permit such examination, the Court, in reviewing the said interlocutors, is to have such regard to the effect of such examination, as shall appear to them to be meet, and, after reviewing the same, to do in the said cause what shall be just.

For the Appellants, *John Clerk, John Blackwell.*

For the Respondents, *Sir Saml. Romilly, John Macfarlane.*

NOTE.—Ureported in the Court of Session.

1819.

THE DUKE OF ARGYLL, &C. v. LAMONT.

[Fac. Coll. Vol. xvii., p. 396.]

GEORGE WILLIAM, DUKE OF ARGYLL; JAMES FERRIER, Esq., his Commissioner; JOHN MACNEILL, the elder, and JOHN MACNEILL, the younger of Gigha; NEIL MACGIBBON, the elder, and WALTER MACGIBBON, the younger of Glasvar, } *Appellants;*

JOHN LAMONT of Lamont, Esq., . . *Respondent.*

House of Lords, 8th February 1819.

SUPERIOR AND VASSAL—MULTIPLICATION OF SUPERIORS.—Held that a superior who had, in giving his vassal a charter, included separate feus in one charter, was not entitled afterwards to sell the two superiorities separately, so as to multiply superiors on the vassal. Reversed in the House of Lords, and held that they might still be disjoined by a sale of the superiorities to two different persons.

The question in this appeal was, Whether the Duke of Argyll was not entitled to sell two superiorities of land belonging to him as distinct and separate superiorities, in consequence of having granted to the vassal in the lands, a charter including *both* in one title, in place of keeping them in different charters as formerly?

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The Duke sold the superiorities separately to Messrs MacNeill and MacGibbon; and the respondent being vassal in the lands, brought an action of reduction and declarator to set aside the sale of these superiorities, namely, the lands of Kilfinan or Killinan and Mill of Auchaphour; and the lands of Cames, on the ground that by his titles, he had only one superior for both,—that he was not in law bound to have more than one superior over him, and that the vassal cannot be compelled to acknowledge more than one.

In defence, it was stated that there was no multiplication of superiors, as the two farms in question, had always been separate estates, and never consolidated; that the Duke of Argyll's commissioner, who granted the charter in question to the vassal, Mr Lamont, was only authorized to grant charters, conform to the tenor of the former charters, and that the charter in his favour in 1791, if disconform, was void, and that it contained a clause saving the Duke's right.

A supplementary action was added, and both actions having come before Lord Hermand, his Lordship pronounced this interlocutor:—"Having heard parties' procurators on the "remit from the Court, repels the defences, sustains the "reasons of reduction in these conjoined process; and finds, "reduces, decerns and declares, conform to the conclusions "of the libels." April 30, 1811.

The appellants gave in a representation against this interlocutor; and the Duke also brought an action of reduction of the charter 1791, so far as the lands of Cames were concerned, on the ground that Mr Ferrier, the Duke's commissioner, had no power to grant such a charter under his commission, which authorized him only to grant charters, *agreeably always to the tenor of the former charters*, &c. To this last action, the respondent conjoined a process of relief against Mr Ferrier, which actions having been conjoined, the Lord Ordinary pronounced this interlocutor:—"Having March 7, 1812.
"heard parties' procurators in these conjoined actions of "reduction and relief, in the action of reduction at Mr "Lamont's instance, against the Duke of Argyll and others, "refuses the desire of the representation for his Grace; of "new reduces, finds, decerns, and declares, conform to the "conclusions of the libel; in the action of reduction at the "instance of the Duke of Argyll, against Mr Lamont, repels "the reasons of reduction, assoilzies the defender and "decerns."

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THE DUKE OF ARGYLL, &c. v. LAMONT.

May 14, 1812. Nov. 26, 1812.

On representation, his Lordship adhered.

The appellants then reclaimed to the First Division of the Court, contending that there was no ground for holding that the two feus had been consolidated; whereupon that Division of the Court pronounced this interlocutor: "The Lords "having resumed consideration of this petition, and advised "the same with the answers thereto, they refuse the desire "of the petition, and adhere to the interlocutors complained "against: Find the petitioners liable to the respondent in "expenses,"* &c.

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* Opinions of the judges:—

LORD BALMUTO.—"These feus were originally distinct. The superior, without consideration of any sort, threw them into one charter; and so far did him a great favour, but still keeping the *reddendo* distinct. In so doing the superior did not part with his privilege of again separating and disposing of them."

LORD BALGRAY.—"I differ. It is true the vassal could not have compelled the Duke to put these feus into one charter. But, in fact, Mr Ferrier did so; and the Duke for fifteen years takes the feu-duties under that charter. He must, therefore, be held as the Duke's vassal. As commissioner, Mr Ferrier had power to renew rights in *any form*, though not to grant new feus. Now, being once possessed of a feudal investiture, the vassal is entitled to rest on it, as a consolidation of the several feus made with consent, and by the will and act of the superior. If the vassal were now to insist for separate charters of these feus, the Duke is not obliged to give them. If that be good on the one side, it must be so on the other. The favour of law is with the vassal. He is entitled to the advantage of an oversight even, if there is no fraud on his part."

LORD PRESIDENT HOPE.—"I agree with Lord Balgray. The separate *reddendos* must remain separate, unless in case of a barony. As *reddendos* often are so various, it seems necessary to keep them distinct. They are always kept up till the end of time, as in the famous Lennox *retours*. This, then, is one individual charter, homologated by the Duke. In truth, unless the Duke meant to consolidate for the future, his charter had no meaning, and he did no favour. What good deeds Lamont did to the Duke we don't know; I cannot say whether it was a gratuitous deed or not."

LORD ARMADALE.—"I agree with Lord Balmuto. Superiors cannot divide one original and simple feu. But here the feus were distinct, and were thrown into one charter, to save expense only, and without any view otherwise to alter their situation."

The Court having been divided in pronouncing this interlocutor, the appellants presented another reclaiming petition, contending, 1st, The question regarded two separate feus, not united. 2d, That therefore there was no consolidation of these feus. 3d, That the Duke's commissioner had no powers to consolidate these two feus. 4th, The want of consent from the Duke. 5th, The want of consideration; and, 6th, That no approbation or homologation on his part had taken place; and it was also discovered at this stage, that no sasine had followed on the Charter 1791 in favour of Mr Lamont, and a sale of the *dominium utile* of the lands of Kilfinan, by Mr Lamont to Mr Cathcart, had taken place.

Feb. 18, 1813.

The Court pronounced this interlocutor: "Alter the interlocutor reclaimed against, in so far as relates to Messrs "MacNeill and MacGibbon; sustain the defences for them "in the actions at Mr Lamont's instance, assoilzie them from "the conclusions of the libel and decern; find them entitled "to expenses; and with respect to the actions at Lamont's "instance against the Duke of Argyll and Mr Ferrier, remit "to the Lord Ordinary to hear parties' procurators further, "and to do therein as to him may-seem proper."*

(The opinions of the Bench being equally divided, Lord Hermand was called in.)

LORD HERMAND.—"I am clear for adhering."

Hume's Coll. Session Papers, vol. CXV.

* Opinions of the Judges:—

LORD GILLIES.—"There were substantial reasons formerly for the rule as to multiplying superiors, because it doubled the very onerous services of the vassal, but these are inapplicable now. *Separatim.* These two persons bought these superiorities *bonâ fide*, without any knowledge of this new charter to Lamont, which I observe was not then (if yet) followed with infeftment. Till sasine it is not *ultra vires* of the superior to sell those superiorities. Lamont had not, therefore, a completed feudal right under the charter in regard to one of these feus. The state of his right is not intrinsically or really altered. It is just the common case of a double right and the first grantee infeft. So that, without going into the question of union of the two feus, I am for sustaining the defences for MacNeill and MacGibbon on that ground. The other matter of the union can only be tried if Lamont shall persist in an action of damages against the Duke, for selling the superiorities."

LORD ARMADALE.—"The feus and the services are still kept distinct in the new charter."

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The respondent then reclaimed, and in consequence of the death of some of the judges, it came to be advised before

LORD CRAIG.—" I am of the same opinion."

THE LORD PRESIDENT (HOPE).—" I was at first for the interlocutor as I then understood the facts. But I find now, that Lamont is not yet infeft, so that in competition with the two purchasers, Lamont cannot prevail. There is, no doubt, an ulterior question of warrandice against the Duke, but that is not here, and has never been heard before the Lord Ordinary, so I am for altering as to MacNeill and MacGibbon, with expenses, and remit to the Ordinary to hear on the question of warrandice."

Hume's Collection of Session Papers, vol. cxix.

LORD GILLIES.—" These feus were distinct formerly. It was supposed the Duke of Argyll, by the entail of his estate, would not have power to sell these superiorities. Therefore he did not object to accommodate his friend, Mr Lamont, by putting these two superiorities into one charter.

" There is some thing very like an error *in substantialibus*, therefore, here, but, perhaps, that is not sufficient to set it aside on that ground.

" There seems to have been no infeftment on the charter to Lamont. It is, therefore, only a *nudum pactum* according to Craig, from which the granter might resile. But still, nobody looking at the records could know any thing of this charter. Until Lamont was infeft, the Duke was not barred from granting these feus to the defenders, for until infeftment, that was not *ultra vires* of the Duke.

" Perhaps the pursuer may bring an action against the Duke, but I suspect he will not make much of this. A charter or a disposition not clothed with infeftment, cannot affect the right of third parties."

LORD BALMUTTO.—Same.

LORD ARMADALE.—Same. " They are not mixed, but stated as separate feus in the charter."

THE LORD PRESIDENT.—" As there was no infeftment in the person of Lamont, I now think the interlocutor wrong. If he had been infeft, it might have been very different.

" The damages may be remitted to the Lord Ordinary."

Campbell's Session Papers.

At advising, 23*d June* 1813,

Mr MACKENZIE said, " The case reported by Elchies, No. 9, superior in vassal, I think is a case in point, and seems to offer a strong answer to the plea, that the right was personal, because there it was found, that the personal clauses were binding on the purchaser."

three judges, Lord Succoth declining, in consequence of relationship to Mr MacNeill. By a majority of two against one this interlocutor was pronounced: "Alter the interlocutor "reclaimed against, and in the action of reduction at Mr "Lamont's instance, against the Duke of Argyll and others, "reduce, decern, and declare in terms of the conclusions of "the libel; and in the reduction at the instance of the Duke "of Argyll against Mr Lamont, repel the reasons of reduc-"tion, assoilzie the defender, and decern: Find the respond-"ents liable in expenses to the petitioner, appoint an account "thereof to be given in, and remit to the auditor to tax the "same, and to report; and supersede extract until first box-"day, in the ensuing vacation,"* &c.

Against these interlocutors the present appeal was brought by the appellants to the House of Lords.

Pleaded for the Appellants.—1st, The rule of the feudal law, that the vassal cannot be compelled to acknowledge more than one superior for one feu, does not apply in this case, where there are two feus granted at different times to different persons, for payment of different feu-duties and casualties which have passed through various vassals by separate titles, and have only been included in one recent charter, granted, not for consolidation, no such form as to superiorities being known or practised, or even spoken of, but for other purposes. 2d, Suppose such form of consolidation was competent, Mr Lamont is not in a situation to avail himself of it, for this reason, that he is not the Duke's vassal, he not being infeft in the lands of Kilfinan, one of the feus; it is therefore impossible, that these lands, *in hæreditate jacente* of the last vassal, Mr Lamont, can unite or consolidate with the lands of Cames, which stand vested in the person of Mr Lamont, as vassal. 3d, The single charter in which the lands were so included, was not granted by the Duke of Argyll, but by his commissioner or steward, who had no power to grant a charter different from former charters, and in particular, no power to give the vassal what did not

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Lord Hermand.—"The case from Lord Elchies seems decisive."

The Lord President.—"I come now back to my first opinion, and was misled formerly by a specialty mentioned by Lord Gillies, in which I now think there was nothing."

* It is stated in the Faculty Collection, that the case was decided on the general question of law.

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formerly belong to him, *i.e.*, the right to insist in his present challenge. If there could be a doubt on this subject, it could only be resolved by the tenor of the original charters, and these, surely, give no support to what is here demanded. 4th, No consent was asked or given, either by the Duke or his steward, to grant a charter such as Mr Lamont construes his one to be; no agreement of the kind was proposed or spoken of; and no consideration paid or offered for such a grant. The parties could not have done such a thing if they had even agreed, because they could not disunite the lands from the baronies to which they belonged, and make a new creation of them, no subject being possessed of such a power. 5th, No sasine having followed upon the charter 1791, the rights of the appellants, Messrs MacNeill and MacGibbon, who purchased the superiorities on the faith of the records, and stand duly infeft, cannot be affected by that latent charter. They are secure and made preferable by the Act 1693, c. 13.

Pleaded for the Respondent.—It is a fundamental principle in the law of Scotland, that a superior cannot multiply superiors upon his vassal. This is so invariably true, that it may be legitimately argued, that when a vassal acquires from the superior separate feus at different times and in different parts, that would not authorize or entitle the superior to split the superiority, and oblige his vassal to hold of different superiors. After the charter granted to the respondent in 1791, which clearly and unequivocally united the two feu rights into one feu, it was *ultra vires* of the Duke to disunite them and sell them to two distinct superiors. The Duke's commissioner must be presumed to have had the consent of the Duke to the charter so framed; and this is still more to be presumed from the late and the present Duke having homologated this charter, by receiving the feu-duties of Kilfinan and Cames *in cumulo* for a period of many years.

It was ordered and adjudged that the said interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered that the interlocutor of the Lords of Session of the 18th February 1813, in the said appeal mentioned, in so far as relates to Messrs MacNeill and MacGibbon, be, and the same is hereby affirmed, excepting in so far as finds them entitled to their expenses: And it is hereby declared, that in consequence of this judgment reversing the in-

terlocutors complained of in the appeal, the remit to the Lord Ordinary to hear parties' procurators further, be superseded.

For the Appellants, *Wm. Adam, John Connell, Geo. Cranstoun.*

For the Respondent, *J. H. Mackenzie.*

The TRUSTEES of the late Duncan Campbell of Glendaruel, Esq., . . *Appellants;*

ALEXANDER CAMPBELL of Ballochyle, Esq., *Respondent.*

House of Lords, 18th February 1819.

PROPERTY—RIGHT OF FERRY—USAGE—GRANT.—The respondent claimed a right of ferry from Dunoon to the opposite shore of the firth of Clyde, which he stated he had possessed both by immemorial usage, and by express grant, for a period of 150 years undisturbed. This right included the Kirn, and points elsewhere on the Dunoon side. The appellant had no express grant of ferry; but as Kirn was within his property, he chose to erect a public ferry there, contending that a proprietor of one barony cannot by law prevent the erection of another ferry over the same water beyond his bounds. In an application for interdict (injunction), held the respondent entitled to prevent the erection of such ferry. Affirmed in the House of Lords.

Attached to the respondent's property in that district of Argyll called Cowal, there is a right of ferry between the village of Dunoon and the opposite shore of the Clyde. This right he enjoyed by a series of charters granted by the Argyll family from 1658 downwards, which expressly conveyed the right of ferry, and he had exclusively possessed this right until very recently, that the late Mr Campbell of Glendaruel had attempted to participate in the profits of the ferry, by establishing a rival ferry at the Kirn, Dunoon, for transporting cattle, goods, and passengers for hire.

The respondent presented a petition to the sheriff for interdict, upon which, after due discussion, the sheriff pronounced this interlocutor:—"Having advised the petition and debate, Sept. 25, 1812.
"together with the whole charters produced, interdicts, pro-
"hibits and discharges John Black and Duncan Campbell
"of Glendaruel, mentioned in the petition, and all others
"employed by them or either of them, from ferrying any

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"person, cattle, or goods for hire from the place called the "Kirn, across the firth of Clyde, until they show they have "a right so to do."

An advocation having been brought to the Court of Session, the Lord Ordinary pronounced this interlocutor:—

Mar. 10, 1813. "Finds it sufficiently established, that in virtue of ancient "charters derived from the family of Argyll who were pos- "sessed of various regalities and baronies erected into an "earldom, the pursuer and his predecessors have long pos- "sessed a right or privilege of ferry which is usually exercised "between the port and lands of Dunoon and the opposite "side of the river or firth of Clyde: Finds it asserted by "the pursuer, and not denied on the other side, that in the "exercise of this right, he and his predecessors were not con- "fined to the lands belonging to them (barony of Dunoon), "but occasionally made use of the landing-place at the Kirn, "and elsewhere, when necessary; and, farther, that the "defender, who also holds his lands of the family of Argyll, "though situated in a different barony, has no right of ferry; "and until a very late period, never pretended to exercise such "right: Finds that with a view to the police and to the "safety of the lieges, no new ferry or ferry boat can be "warrantably established, especially in such a situation as "that in the river or firth of Clyde, opposite to the properties "of the parties, until the same has been examined and "approved of, and the fares settled by the justices of the "peace and commissioners of supply, as authorized by law: "Finds that under all these circumstances the pursuer was "authorized in following out his own right, to apply to the "Judge Ordinary for the purpose of maintaining the pos- "session as it had been enjoyed for a long period; therefore, "refuses the representation and additional representation, "and adheres to the interlocutor represented against; finds "the representer liable in expenses; allows an account "thereof to be given in, and remits to the auditor to tax "the same."

On reclaiming petition to the Second Division of the

Dec. 2, 1813. Court, their Lordships pronounced an interlocutor adhering; and on second petition they pronounced this interlocutor:—

Jan. 18, 1815. "Adhere to the interlocutor reclaimed against, in so far as it "continues the interdict, and finds expenses due; and refuse "the desire of the petition to that effect; but find it unneces- "sary to determine as to the other findings in the interlocutor "of the Lord Ordinary."

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, The respondent never produced or referred to any legal title in his person to support him in the very entrance of this action. He was the original pursuer; and it is the universal rule in practice, that the pursuer, especially when litigating about an heritable right, is bound to prove a valid and unexceptionable title in his own person. The title, however, of the respondent, instead of giving him the right of ferry within the territory in which the appellants' station is situated, is absolutely exclusive of such right. The charter founded on gave him a conveyance merely to "illam cymbam transfertoriam vulgo vocat, the ferry boat "of Dunoon, cum domibus, ædificiis, et terris eidem pertinen, "et adjacen, &c., jacen. in baronia de Dunoon." The properties and rights thus conveyed, are such as lie or take their origin within the barony of Dunoon; but the appellants' lands do not lie within that barony. On the contrary, by charter 1680, six years after the respondent's charter, they are described to lie within a different barony altogether.

2d, There is no rule or precedent in the law of Scotland, which has declared that the proprietor of one barony, having a right of ferry, can legally prevent the establishment of a ferry over another part of the same water or channel opposite to a different barony. This has never yet been found in Scotland. And if it has not, the appellants submit that parties who have acquired their lands under a belief that they were free from restraint, cannot now, with justice, be put under any limitation in the use of their property.

3d, Neither could grounds of *public interest* be founded on to justify the interdiction of the passage boats belonging to the appellants' constituent. On the contrary, the establishment of the appellants' right would have been of essential benefit to the public, and the situation of the property must carry conviction of the utility of the establishment.

4th, At all events, the interdict, by the interlocutors appealed from, has been granted in too general and broad terms. The interdict is broad and unqualified, prohibiting the appellants or their tenant "from ferrying any person, cattle or "goods for hire, from the place called the Kirn across the "firth of Clyde." But the respondent's right of ferry extends only from the barony of Dunoon to a station called the Cloich on the opposite side of the channel, while the interdict is made to apply to no point in particular on the opposite side, and,

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therefore, may apply to any fishing village on the opposite side, of which there are many.

Pleaded for the Respondent.—1st, The respondent has an indisputable right to the ferry of Dunoon, in all the extent to which it has been exercised in time past, whether by himself or his ancestors; and from time immemorial this usage has extended to the point of Kirn.

2d, Independent of such usage, he is entitled, at common law, to interdict and put down any ferry which is attempted to be established so close in his vicinity, as necessarily to interfere with his ferry.

3d, Besides, by their charters, the appellants can show no right to set up a ferry at the Kirn; while, by the respondent's grants and charters, there is an express right of ferry conferred.

After hearing counsel,

It was ordered and adjudged that the said interlocutor of the 18th January 1815 complained of be, and the same is hereby affirmed: And it is further ordered and adjudged that the other interlocutors, so far only as they are adhered to by the said interlocutor of the 18th January 1815, be, and the same are hereby affirmed, and that the appeal be dismissed.

For the Appellants, *John Clerk, John Cuninghame.*

For the Respondent, *John Cay, Henry Davidson.*

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MEEK v. MITCHELL, &c.

THOMAS MEEK, Writer in Glasgow, *Appellant;*

THOMAS MITCHELL & COMPANY, and JOHN HARPER, Thread Manufacturers in Glasgow, . . . *Respondents.*

House of Lords, 26th, April 1819.

ACT—CONTRAVENTION OF—ILLEGAL SEIZURE.—The Act 28 Geo. III. c. 17, made certain regulations in regard to the manufacture of linen thread, otherwise called Nun's thread, and the respondents, manufacturers of that thread, were alleged to have committed a breach of these regulations. Held that they had committed no breach of these regulations, and ordained that the seized thread be restored, reserving claim for damages as for an illegal seizure. Affirmed in House of Lords.

This was an action brought by the appellant, as procurator-fiscal of the Justice of Peace Court of the Lower Ward of

Lanarkshire, founded on the provision of an Act of Parliament, 28 Geo. III. c. 17, in regard to the manufacture of linen thread of a certain fineness, which Act fixed the size of the "reel used in reeling or making up that kind of thread "commonly called ounce or nun's thread," and also fixing that it "shall be one yard or thirty-six inches in circumfe- "rence," and declaring that any person who shall use, in reeling or making ounce or nun's thread, a reel less than one yard or thirty-six inches in circumference, should be convicted of an offence, and subjected in the forfeiture of the thread and the penalties of the Act.

The respondents had been charged with committing a breach of these regulations, when the present complaint was brought before the justices. The thread so manufactured was ordered to be taken possession of under a warrant.

The petition was allowed to be answered, and when advised, a proof ordered and judgment pronounced, and in an advocation of this judgment to the Court of Session, the Court pronounced this interlocutor:—"Upon report of Lord Glen- May 26, 1814. "lee, Ordinary, and having advised the mutual informations, "the Lords advocate the cause, find in terms of the inter- "locutor of the justices, that the thread as made up and sold "by the defenders, is not contrary to, nor any evasion of the "Act of Parliament libelled on; therefore, ordain the seized "thread to be restored to the defenders respectively; assoilzie "them from the conclusions of the action, and decern: Find "the pursuer liable in the expense of procedure, both in this "Court and before the justices, and remit to the auditor to "report on the account thereof when lodged: Find it un- "necessary to pronounce any deliverance on the petition and "complaint for the defenders, and reserve to the parties to "be heard on the question of the legality or illegality of the "seizure in the action of damages brought by the defenders "against the pursuer."

On reclaiming petition the Court adhered. Feb. 15, 1815.

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £50 costs.

For the Appellant, *Sir Saml. Romilly, Andrew Skene.*

For the Respondents, *Fra. Horner, Jas. Grahame.*

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CLARK, &C. v. CALLENDER, &C.

[Fac. Coll., vol. xix., p. 676, *et* Dickson on Evidence, p. 308.]

ALEXANDER CLARK, Writer in St Andrews; JAMES CLARK, Farmer at Alconburry; BETTY CLARK, wife of JOHN WALKER, and him for his interest; and MARGARET CLARK, Tenant in Dron, } *Appellants;*

JOHN CALLENDER of Lady's Miln; ALEXANDER CALLENDER of the Falkirk Bank; JAMES AITKEN, Writer in Falkirk, and JOHN KER, Writer to the Signet, surviving and accepting Trust-Disponees and Executors of the deceased Alexander Callender, late Grazier in Falkirk, } *Respondents.*

House of Lords, 16th June 1819.

CONTRACT OF SALE OF WHEAT—PAROLE EVIDENCE—COMPETENCY OF APPEAL—WAGER.—The original bargain in regard to a sale of wheat was constituted by writing; but Clark transferred and conveyed his interest in this bargain to Alexander Callender, grazier, without any writing. Held (1st) That it was incompetent to prove by witnesses the transfer or conveyance of that party's interest in the contract so constituted. And (2d) That parole testimony was inadmissible to prove the constitution of an obligation of relief, assuming *that* to have been the character of the transaction entered into. (3d) Question, Whether this was a wagering transaction. (4th) Objection to the competency of this appeal, sustained as to two of the interlocutors, but repelled *quoad ultra*.

On the 8th of December 1804, a transaction was entered into between Mr James Gibson, Writer to the Signet, on the one part, and Mr Bayne, then Provost of Cupar, Mr Aitken, writer, there, and Mr Christie of Foodie, on the other, regarding a sale of wheat, the terms of which were reduced to writing, and were as follows: "Provost Bayne, Mr Alex- "ander Christie, and Mr George Aitken, bind themselves to "deliver to Mr Gibson 1000 bolls of best Fife wheat, each "year, for ten years, the first delivery to be in February "1806, for crop 1805, or to pay the highest Fife fiars there- "for, in their option, for which Mr Gibson obliges himself "to pay them 30s. a boll, or pay the difference between that

"and the price of the highest Fife fiars, if the fiars are below "30s. This is to be extended on stamped paper by Mr "Greenlaw. Cupar, 8th December 1804.

(Signed) "JAS. GIBSON.
"WILL. BAYNE.
"GEO. AITKEN.
"ALEX. CHRISTIE."

This missive was afterwards engrossed on stamped paper in more regular form.

Some time after this, the late Patrick Clark, the father of the appellants, met Mr George Aitken, one of the parties to the above contract, in Cupar, and purchased from him his share of the agreement by exchanging missives, in these terms: "I agree to accept of your share of your bargain with Mr "Gibson for the delivery of 1000 bolls of wheat at 30s., or "paying the Fife fiars, and offer you £40 for your bargain. "Yours, &c.

(Signed) "PATRICK CLARK.

"WM. BAYNE, *witness.*
"JAS. THOMSON, *witness.*
"Cupar, 4th Feby. 1805."

"Mr Clark, I accept of your offer, the £40 payable at "Candlemas 1805. Yours, &c.

(Signed) "GEORGE AITKEN."

Shortly after this latter bargain, Mr Clark had a party with him at dinner in his house at Dron, among whom was the respondents' constituent, the late Alexander Callender, grazier at Falkirk. In the course of conversation Mr Clark happened to mention the bargain he had made, in regard to the wheat, and stating his regret about it, adding that he feared it would not turn out so advantageous as was expected. Upon which Mr Callender stated that he thought he had made a very good bargain, so much so, that he would be happy to take it off his hands. Mr Clark accepted of this offer. No writing passed between them. The only ceremony was the shaking of hands as evidence that it was so agreed on between them.

It was with reference to this last bargain more directly, that the present question was raised, but it resulted out of an action brought by Mr Gibson against Mr Aitken, who resisted implement of the contract on the ground, that it was not a fair agreement but a gambling transaction or bet; Mr Aitken,

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on his part, brought a process against Mr Clark, and Mr Clark brought the present action against Mr Callender (who seems to have died during the action), concluding for payment of the £40 agreed on for the transfer of his interest, and also to implement and fulfil to the said James Gibson, or to the said George Aitken, his said share of George Aitken's part of the said bargain.

Issues were ordered to be framed to be tried by jury. The following issues were sent to trial.

"Whether the defender did, in or about the month of "February 1805, enter into an agreement with the pursuer, "to relieve him from, and take upon himself, the said defender, "a certain bargain set forth in the summons, bearing date "the 8th December 1804, between Mr George Aitken of "Cupar in Fife, and others, and Mr James Gibson, Writer "to the Signet, respecting wheat or the price of wheat; from "which bargain the said pursuer had, before the said month "of February, relieved the said George Aitken?

"Whether the defender did not, at the same time, agree to "pay the sum of £40 sterling, to the said pursuer, or to the "said George Aitken, on condition of the bargain being July 16, 1818. "made over to him, the defender?"

On the trial, the following verdict was found for the pursuer on both issues: "The jury say, upon their oath, That, "in respect of the matters of the said issues proven before "them, they find for the pursuer on both issues." The Jury Court, in applying the verdict, reserved objection to the competency of parole testimony in this case, as appears by the following entry of the objection and reservation: "Objected "to the competency of parole testimony in this case, that "the contract sought to be established against the defender, "was of such a nature, importance, and duration, that it "could not be constituted without writ; that it was a con- "tract substantially for payment of money, which could not "be proved or constituted by the law of Scotland without "writ; that it was a 'bande or obligation of great impor- "'tance,' under the statute 1579, chap. 80; that it was a "contract originally constituted by writ, transferred to the "pursuer by the same mode, and could, therefore, neither be "extinguished nor farther transferred, except by writing; "and that these objections must be understood as stated to "all the witnesses who might be called to establish the trans- "action in question."

"Reserved for the consideration of the Court of Session

"in this case." The cause then being returned, the Lords of Session, on motion that the verdict be set aside on the question of law, pronounced a judgment allowing him to show cause "why the verdict in this case should not be set aside, "and a new trial granted." And, after debate, the Court set aside the verdict accordingly, and ordered a new trial. Dec. 2, 1818. Jan. 12, 1819.

The ground on which the verdict was set aside, although not stated in the interlocutor, was the assumed incompetency of parole evidence, to establish the bargain, which forms the subject of the action.

On a second trial, the same evidence was tendered, but rejected, and the jury found a verdict for the defender on both issues; and on bill of exceptions being tendered, and taken, and heard, the Court of Session pronounced this interlocutor: Feb. 1, 1819.

"The Lords having heard counsel, in terms of the former "deliverance, in respect it appears from the bill of exceptions, "that the pursuer merely repeated, on the second trial, his "offers of the same sort of parole evidence, as had been tendered "and received on the first trial, and that it had no reference to "a proof of homologation or *rei interventus* following on the "alleged agreement, they disallow the exceptions, and declare "the verdict final and conclusive, in terms of the statute: "Find the pursuer liable in the expense of the discussion "in this Court on the bill of exceptions: allow an account "thereof to be put in, and remit the same when lodged, to the "auditor of Court to tax and report." Mar. 9, 1819.

From these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, The objection of the incompetency of parole evidence, however well founded originally, was by implication repelled by the judgment of the Court of Session, remitting the cause to the Jury Court; or at least, the respondents are barred *personali exceptione*, from stating it after such remit. It was, from the first, apparent, that there could be no other evidence but parole proof in support of the conclusions of the present action, which was libelled on a verbal sale to Callender of the interest of Clark, in the original bargain with Mr Gibson. It was further distinctly set forth in the condescendence, that no other proof was to be brought but parole evidence. The Lord Ordinary, in these circumstances, by ordering answers to be lodged, directed to the facts of the case, with a view to a remit to the Jury Court, virtually signified his opinion, that the objection was unfounded; and it was necessarily repelled,

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when, after the pleading *viva voce* on the point, the case was ordered to be prepared in terms of the Act of Parliament for the decision of a jury. The same inference must be drawn from the interlocutor remitting the cause to the Jury Court, after the issues and the relative pleadings were reported by the Lord Ordinary to the judges of the Second Division. The respondents were bound, at this stage of the proceedings, if not before, to object to a jury trial, and they were therefore barred from afterwards insisting upon the objection to the competency of parole proof.

2d, But the objection is unfounded on its merits. By the law of Scotland, every bargain relative to moveables, may be established by parole proof; and, in particular, bargains of sale, may be so established to any extent. The authorities founded upon by the respondents, in support of the distinction between nominate and innominate contracts, do not prove any such distinction; and even, so far as they go, they are unsupported by the decisions of the Court, which exhibit numerous instances of contracts regarding moveables, and having no known prestations, being proved by parole evidence, although beyond the sum of 100 pounds Scots. The general rule of the law of Scotland is, that all relevant averments may be proved by witnesses, unless in transactions regarding land or heritable property, pecuniary obligations beyond the sum of 100 pounds Scots, and certain other special cases, in which, on grounds of expediency, parole proof has been considered dangerous. And there is no authority, in the reported cases, for holding, that even such a transaction as that which was originally concluded by Mr Gibson, cannot be proved by parole evidence.

3d, Besides, there is no authority for holding generally, that a bargain once constituted by writing, cannot be transferred without writing; the fact of its having been put in the form of a written obligation, is an accident which cannot affect the competency of the evidence of after-transactions regarding the same subject. The authorities referred to, apply merely to cases where the original transaction cannot, by law, be otherwise constituted than by written instrument; and even with regard to these, it is nowhere laid down, that they cannot be transferred without writing, the authorities cited being merely applicable to the extinction of such obligations. Even to this effect, parole evidence has been received, when it goes to establish facts which may, by consequence, extinguish the obligation. In the present case, however, the

fact to be proved does not fall under the rule or the exception, however broad it may be, regarding the extinction of written obligations. The fact to be proved here is a sale of moveables, and that can be proved by parole. It is not a question as to the manner, how the extinction of a written obligation may be proved.

4th, The transaction does not fall under the only other rule which has been referred to by the respondents, namely, the incompetency of proving obligations of relief by parole evidence. This is an exception by no means universal, as is proved by the case of Smollet in 1793, where the Court unanimously allowed a cautionary obligation, deducible from facts and circumstances, to be proved by witnesses. But the exception is totally inapplicable here, as the ground of action is a bargain of sale, and not of relief.

Smollet v. Bell, &c. Mor. p. 12354.

Pleaded for the Respondents.—1st, This appeal is incompetent, in so far as it complains of the interlocutor of 2d December 1818, directing counsel to be heard against a motion by the respondents for a new trial. The appeal is likewise incompetent, in so far as it complains of the interlocutor of 12th January 1819, setting aside the said verdict, and directing a new trial to take place. Because, by the Statute 55 Geo. III., c. 52, it is explicitly enacted, that "such interlocutor, granting or refusing a new trial, shall not "be subject to review by petition or appeal to the House of "Lords." There is, therefore, no authority or jurisdiction by which these two interlocutors can be reviewed or altered. An appeal against these interlocutors was incompetent at the time of their being pronounced, and the occurrence of a new trial, in obedience to them, cannot alter the statute law with regard to them.

2d, The interlocutor of the Court of Session, of the 9th March 1819, disallowing the exceptions, and declaring the verdict final and conclusive, is founded upon a judgment of the Court of Session previously pronounced, *namely*, upon that of the 12th January 1819, setting aside the verdict and directing a new trial. It has already been shown, that this last judgment cannot be reviewed nor altered, even by the eminent jurisdiction of this most Honourable House. It is, therefore, *res hactenus judicata* between the parties, that parole proof was incompetent to establish the allegations preferred by the appellants.

Unless, therefore, it is to be held, that the *exceptio rei judicatæ* is struck out of the law in all cases which come

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under the cognizance of the Jury Court, it must apply in the present instance.

3d, By the law of Scotland, the allegations contained in the summons and issues of the pursuer, cannot competently be established by parole testimony. *First*, Parole testimony is not admitted to prove the constitution of any innominate contract, of which the value exceeds £100 Scots. *Second*, Parole testimony is not admitted to prove the assignation or discharge of a contract which is constituted by writ. *Third*, Parole testimony is not admitted to prove the constitution of an obligation of relief of a written obligation.

After hearing counsel,

The LORD CHANCELLOR (ELDON) said,*

"My Lords,

"Whatever may be ultimately the nature of your Lordships' judgment upon this case, if it should be, as I apprehend it is very likely to be, a judgment of affirmance, it is impossible, attending to the circumstances of this case, not to feel, that it is proper to depart from the usual course of affirming without giving reasons upon the subject. *That* having been the practice of this House, it ought not very hastily to be departed from; but, when one looks at the nature of this appeal, it is evident that the House must be extremely careful as to the terms in which it gives its judgment, let the nature of that judgment be what it may. If this had been an appeal from certain interlocutors which are contended not to be subject to appeal; and if those who contend that these interlocutors are not subject to appeal, are right in so contending, I take it, our course would have been, to have considered whether we would enter upon the appeal at all, and probably, by referring the appeal to the Appeal Committee, that Committee would have advised the House, that the appeal ought not to be entertained; but it happens to be an appeal which cannot be so treated; because if there be any of the interlocutors which are the legitimate subject of appeal, the appeal embracing also the other species of interlocutors, the Court would be bound to hear it, and our judgment, supposing it to be a mere judgment of affirmance, would be a judgment the effect of which would be mistaken, if we find nothing with respect to the appeal, as it is an appeal against some interlocutors which can be fairly contended to be unappealable: the judgment, therefore, must be a judgment pronouncing that these latter are not the subject of appeal; and with respect to the other interlocutors, dealing with them as justice may require them to be dealt with.

* From Mr Gurney's short-hand notes.

"My Lords, this case has certainly been very well argued on the part of the appellants, both originally, and in the reply, and there were many points put by Mr Stephen with great ability. There is one view of the case in which, I think, none of your Lordships can differ, and that is, that this argument must have satisfied us that there has been, in this case, a monstrous waste both of time and expense, and it becomes necessary to look a little through this proceeding, to see what the nature of the case really is.

Describes the nature of the bargain.

"My Lords, an agreement was made between a Mr James Gibson, who, I think, is a writer to the signet; and it affects to be a bargain in respect to a dealing in grain, for I cannot think it was in the contemplation of any one of the parties, that one single grain of wheat should ever be delivered,—it is between Mr James Gibson, writer to the signet, on the one part, and Mr Bayne, the Provost of Cupar, and Mr Aitken, writer, there, and Mr Christie of Foodie, on the other—they were dining together—all these bargains are made soon after dinner—both the original bargain and the sub-contracts, as they are called—they enter into this agreement,—having speculated first upon the probable price of land and of grain: 'Provost Bayne, Mr Alex. Christie, and Mr George 'Aitken, bind themselves to deliver to Mr Gibson 1000 bolls of 'best Fife wheat each year for ten years, the first delivery to be 'February 1806, for crop 1805, or to pay the highest Fife fiars 'therefor, in their option'—that is, the average market price—'for which Mr Gibson obliges himself to pay them 30s. a boll, or 'pay the difference between that and the price of the highest Fife 'fiars, if the fiars are below 30s. This to be extended on stamped 'paper, by Mr Greenlaw.' Now, my Lords, that there was an option here, in one circumstance, nobody can doubt: for that Mr Bayne, Mr Christie, and Mr Aitken, were not bound to deliver one single grain of wheat in the ten years, it is impossible to doubt, they having the option either to do that, or to pay the highest fiar prices; on the other hand, it has been contended that there is certainly more doubt with respect to Mr Gibson having had an option; but, I think it manifest and clear that, whether he had an option or not, there never would be a grain of wheat delivered between them, for the meaning of the agreement is neither more nor less than this: If the wheat be above 30s., we will deliver you the wheat, or pay you the difference; on the other hand, if it is below 30s., we will deliver you the wheat and have the 30s., or, we will not deliver you the wheat, and you shall pay us the difference between 30s. and the lower price. Now, I ask, Whether any wheat would be delivered under these circumstances, where the parties could deliver themselves from the bargain by paying the difference between the 30s. and the price, whether the price was above or below 30s.? and Whether this is to be called, in any sense whatever, a sale of goods? or Whether it is anything

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more or less than a wager, and that for a value, according as the price of wheat should be in the course of that year?

"My Lords, we cannot, however, take upon ourselves to apply any principles of the law of Scotland to this, as a wagering bargain, because the Court of Session have, in this complicated proceeding, the nature of which I shall state to your Lordships presently, held this to be a good bargain; but I take upon myself, at least, to say, that I am so stupid that I cannot look upon this as a sale of goods—it is not at all like a sale of goods, nor does it fall under that species of known denomination as a contract, distinguished by the designation of nominate, in contradistinction to innominate.

"My Lords, this notable bargain, called a sale of goods, which took place after a good dinner, at Mr Bayne's, on the 8th of December 1804, was so soon repented of by Mr Aitken, or at least, he wished to get out of the matter so early as the 4th Feb. 1805, and he assigned in favour of the present appellant, Mr Clark, his interest concerning this transaction. That assignation was reduced to writing in a letter, in the following tenor:—Mr Aitken, 'I agree to accept of your share of your bargain with Mr 'Gibson, for the delivery of 1000 bolls of wheat at 30s., or paying 'the Fife fiars, and offer you £40 for your bargain.' If it had rested there, the £40, in point of law, would, upon that undertaking, have been payable immediately; but, the acceptance of Mr Aitken addressed to Mr Clark varied from this: 'I accept of your 'offer, the £40 payable at Candlemas 1805,' which, your Lordships know, would be very soon after the 4th February 1805, so that this is taken to be (and that cannot be disputed, for the Court of Session have decided that) a good assignation of Aitken's share of the bargain. Your Lordships will observe those words, 'share of the bargain'—when you come to look at the summons you will see whether this summons treats Callender's transaction as a transaction of relief, by looking to see how it treats Clark's transaction in respect to Aitken. The £40, which is rather more than £100 Scots—a sum which gives value to a contract with respect to the testimony by which it is to be proved, according to some of the writers—the £40 is to be paid at Candlemas 1805, and he agrees to accept this offer, the £40 being payable at Candlemas 1805.

"Now, I do not enter into the question at all, whether, supposing the original transaction to be a good transaction, this would be a good transfer of Aitken's share of the bargain; whether it contains enough upon the face of it, and in the terms of it, to instruct that Clark understood what he was bargaining for. The expressions in this transfer are mighty short, they do not refer in terms to the bargain, the assignment to which is intended to be made; but this must be taken, in consequence of the judgment of the Court of Session, which I shall have occasion to mention pre-

sently to your Lordships, to have placed Mr Clark (to use an expression which I see has great weight) *in the shoes* of Mr Aitken; but still it must be admitted, that throughout the whole of these bargains, though Mr Clark had got into Mr Aitken's shoes, Mr Aitken had not got out of his own shoes.

"My Lords, after this, Mr Clark seems to have grown very sick of the contract he had made with Mr Aitken; and, as the appellants state it, 'soon after this bargain, Mr Clark had a party 'at dinner at his house at Dron, among whom was the late Alex-'ander Callender, whom the present respondents represent, and in 'the course of conversation, Mr Clark happened to mention that 'he had purchased Mr Aitken's third of Mr Gibson's wheat-con-'tract, adding his regret at having done so, as he conceived the 'transaction would not be so advantageous to him as it had been 'represented by Mr Aitken. Upon this Mr Callender observed 'that he thought Mr Clark had made a very good bargain, and 'that he would be happy to take it off his hands, as he knew he 'could get a contract in Stirlingshire for a permanent sale of the 'same quantity of wheat, at two or three shillings a boll less.' Now, I see it is in evidence, that they were all extremely sober at the time—it is thought very material that that should be given in evidence, and yet I cannot help doubting whether Clark was sober enough to exercise his own judgment, to the extent of knowing what this bargain meant, because, if the prices of corn were so much below 30s. as 2s. or 3s. a boll, Mr Clark would not have made so very good a thing of this as it is supposed he might have made. Mr Clark, it is said, 'immediately accepted of this offer, 'and the agreement was made in nearly the following terms:— 'That Mr Callender should step into Mr Clark's shoes, and relieve 'him of the bargain he had made with Mr Aitken. Upon this 'the parties shook hands, in evidence that the bargain was con-'cluded, and it was fully considered to be so by both, as well as 'by all the company present.' There then follows a statement, that 'it was farther settled, that Mr Clark should furnish Mr 'Callender with a copy of the original agreement made with Mr 'Gibson, and also of his own agreement with Mr Aitken; and as 'Mr Clark had no copies by him at the time, he engaged to pro-'cure and transmit them next day, which was accordingly done, 'and they were received by Mr Callender, who, on innumerable 'occasions afterwards, admitted and represented himself to others, 'as completely bound by the transaction.'

Opinion as to the effect of a bargain so completed.

Now, here the transaction is stated in a way in which, I think, I may venture to say, in an English court, it would be very soon shown that nothing could be made of it, because, at the time this bargain is stated to have been concluded, that is, immediately after dinner, it is admitted, that neither the original agreement, nor Clark's agreement with Aitken was produced; but it is said

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the terms of the bargain were clearly explained. Now, the condescendence proves clearly that they were not; for, with respect to £40, which was to be paid by Clark to Aitken at Candlemas 1805, the appellant himself admits, in his condescendence, that he did not recollect at the time whether it was to be paid at the beginning or the end of the agreement, the fact being, that it was to be paid neither at the end nor at the beginning of the agreement, but at Candlemas 1805. It appears, therefore, clear, that the bargain would not have been considered concluded in an English court until after these papers had been sent next day, and something had been done, either on the one part or on the other part, and perhaps on both parts after these papers had been sent.

"My Lords, these three short contracts having been made in order to have it determined whether Mr Callender was bound by this verbal agreement he had made with Mr Clark, it becomes necessary, as your Lordships observe, to see whether Mr Gibson's original contract with Bayne, Aitken, and Christie, was a binding contract; secondly, to see whether Clark's contract with Aitken was a binding contract between these two; if the first contract did not bind the four who were parties to it, and the second contract did not bind the two who were parties to it, of course the third contract could not bind the parties to it, if Clark had nothing he could assign to Callender by the contract.—The first proceeding of the Court of Session was a proceeding on the part of Gibson to have the contract declared good as against Bayne, Aitken, and Christie; and then, secondly, there is a proceeding by Aitken against Clark, to have the second contract declared good; and then, thirdly, there is a proceeding by Clark against Callender. *Who* the parties were that fought the two first, I cannot represent to your Lordships; it is enough to say to your Lordships that the Court held the first contract to be one, to which there was no good objection in law, and that it should be carried into execution; and that they held that the second was a good assignment of Aitken's share in the contract; and then Clark was put *rectus in curia* to fight with Callender; but before he could enter the lists with him, he had been obliged to go through this previous proceeding. It becomes necessary next to see what is the proceeding which takes place, but before that, I will say (which I utter with great deference to the Court of Session), I am not sure that in giving them this trial by jury, which, if rightly used, will be a great blessing to that country,—I am not sure it will be such, if this House does not (with respect to the pleadings in Scotland, and more especially with respect to the pleadings so taken out of the Court of Session, in matters of fact to be tried by the Jury Court), endeavour, if possible, to introduce into the transaction of pleadings, both in the Court of Session and in the Jury Court, that nicety which has

long distinguished, and which, I believe in my conscience, is the best security for the administration of justice in this country; and this observation I will apply both to the transaction by which the party enters into the Court of Session, I mean his summons, and likewise to the trial by jury, arising out of that summons, for it is impossible, I think, for any one who has had the experience, many gentlemen now at the bar have, and it is impossible for me, after having spent so large a period of life in hearing arguments at your Lordships' bar in Scotch cases, and having to decide upon them here, not to see to what an enormous waste, both of time and expense, these matters may proceed by not holding men in their *summons*, to say, what it is that they demand, and upon what grounds they demand it, and do not confine themselves to saying, what it is they demand. If they confine themselves to what they demand, they ought, in the proceedings arising out of their demand, to be confined to that which they do demand, and if they state the grounds upon which they demand it, they must take care to state precisely and accurately those grounds, and the Court must confine them to those grounds.

"My Lords, the summons begins with stating, that the pursuer, that is Clark—for this is the *third* action—that the pursuer has been convened in an action before the Lords of Council and Session, at the instance of George Aitken, setting forth, that upon the 8th December 1804, they entered, with these other parties, that is the first parties, into an agreement, the terms of which I have first mentioned; that some time after the date of the said agreement, the pursuer, it is stated, offered to take the said George Aitken's share of the bargain off his hands, and gave him £40 sterling of profit thereon; and that this offer was accepted of by the said George Aitken, not stating when the £40 was to be paid according to the acceptance; 'but that, although 'the said George Aitken had often desired and required the pur-'suer to make payment to him of the foresaid principal sum and 'interest thereof, yet he refused,' &c., and then you are told there is the usual prayer for a sum to be given in damages. Now, the prayer of Aitken against Clark is a prayer that has not that alternative; the Solicitor-General has observed and has commented upon the prayer of the summons of Clark against Callender, which it will be necessary to attend to by and by.

"Then it states, 'That Alexander Callender having been in the 'pursuer's company in the month of February 1805, along with 'William Haig, Robert Meldrum, and others, the above bargain, 'which had excited some discussion in that part of the country, 'being the topic of conversation, and the pursuer having stated 'to the said Alexander Callender the nature and terms of the 'original bargain betwixt the said James Gibson and one other 'gentleman, and also the nature and terms of the paction betwixt

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'the said George Aitken and the pursuer, the said Alexander 'Callender conceiving it to be so extremely good a concern on 'the part of the pursuer, offered instantly to the pursuer to take 'the bargain off his hands, and to make payment to the said 'George Aitken, of the said sum of £40 for his, the said George 'Aitken's share or interest in the said concern as aforesaid.' Now, as this offer is here stated, the meaning of it in law, I take to be, that he offered to take the bargain off his hands, and to make payment of £40 for his share of interest, and that, that £40 was to be paid with interest according to what is stated in a former part of the summons, that is, at Candlemas 1805, that must be taken to be the allegation of the summons.

"Then, he says, 'The pursuer immediately accepted of this offer, 'and the said Alexander Callender and the pursuer did there-'upon join hands across the table, in presence of the company, 'in token of its being a concluded bargain, whereby the said 'Alexander Callender placed himself in the vice and stead of 'the pursuer in the said concern, and became bound to free 'and relieve him of the whole obligations and consequences 'thereof.' It does not appear whether this Mr Clark ever opened his lips at all upon the subject at this time; what might have been proved against him in order to show that he was bound by the bargain, I think it appears very difficult, indeed, to collect from the papers before us.

"Then, he says, that he had 'frequently desired and required 'him to make payment to him;' this is upon the 18th of October 1806, 'that he has frequently desired and required,' (here his Lordship read the conclusion of the summons). Now, if Aitken placed Clark in his shoes, and if Clark placed Callender in his shoes, Aitken having been united with two other persons in the first contract, being concerned jointly with them, they having the liberty of choosing whether they would deliver the wheat, or whether they would pay the money; the option of Callender to pay Clark a sum of money, or to give to Clark so much grain, is not an option that would necessarily enable Clark to make good his contract with the other two in the delivery to Gibson; and it is upon that I entertain a doubt from beginning to end, whether those assignments ever could have been made available, unless Provost Bayne and Mr Christie were parties to the suit; for it is an agreement, which that person, substituted in the room of another person, is, when joined with two other persons, to make good as the act of the three; and, therefore, I think it impossible to say, that if this is a proceeding, seeking the benefit of an assignation in relief, that the other party can make it other than an assignation in relief; for whether either of them can make it an *obligation* in relief, is the principal question in this cause, on which I shall not touch at this moment.

"My Lords, to this summons an answer was put in, and here I shall take the liberty to say, that if this matter had been tried before me in England, I am extremely afraid I should either have fallen into a very great mistake, or I should have relieved the cause of all further proceeding in it, almost immediately; because, if a count in a declaration had been of the same nature as this summons is, the very moment it was admitted by Mr Clark, 'that 'at the time the pursuer mentioned, he did not recollect whether 'the above sum was payable at the beginning or end of the 'agreement, but that he said to Mr Callender, at all events, this 'should make no difference, for he (Callender) should not be 'called upon to pay the £40 till the end of the ten years,' the moment he had stated in his summons an agreement that this condescendence did not *state* as the agreement, I should have said, that he must state the agreement as it is, and not as it is not; but, however, that point is not taken; the defences are not put in; and among others, it is said, 'that although he recollects, that at a 'convivial meeting, at which the pursuer, he, and various others 'were present, the subject of this agreement was talked over, and 'some conversation ensued betwixt the pursuer and defender, 'about the defender taking his share of the bargain, yet, it is 'certain, there was no concluded agreement betwixt them on the 'subject.' Now, here also is another observation, I think, which would have been applied to this case in our courts in England; if you had declared that the bargain was completed on that day after dinner; if it was a bargain made at any other time, and not only if it was a bargain made at any other time, but if it was a bargain in terms different from those stated in your declaration; you must begin again, and you cannot recover upon that declaration; and the time of payment of money is a very material article in any bargain that can be made between parties. Then it is further said, 'that the transaction is of such a nature, that even if 'parties had been at one upon it, writing was not only in every 'sense proper, but essentially necessary for its constitution, and 'without which it could not be binding upon either party.'

"A condescendence is afterwards called for, and that before the direction for a trial by jury; and there are in this condescendence ten articles upon which the pursuer condescends. I have before stated the sixth article, with respect to the time at which the £40 was to be paid; but it concludes thus: 'That such per-'sons as Mr Callender.' (Here his Lordship read the ninth article of the condescendence.) Now, I do not apprehend that a person, who puts in a condescendence is at liberty to say, that what he states in his condescendence is wholly immaterial; here are allegations in the *ninth* and *tenth* articles, that bargains of this kind were usual between Mr Callender and the pursuer, which would not, I apprehend, alter the law, 'and that it is not unusual

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'to transfer verbally the subject of a bargain, which from accidental circumstances may have been reduced to writing; that is, I suppose, may have been reduced into writing originally.

"When the case comes before the Lord Ordinary, he directs the issues. I will read to your Lordships, *first*, the issue whether an agreement was made. Now, I have no doubt at all, that when an issue is directed, as to whether an agreement was made, if that agreement was made, only, if I may use that expression in a manner in which the law says, an agreement is not validly made, that the conclusion of the law is, though it is so stated to the jury, for them to try the fact that the agreement is not made. It may be said that my Lord Ordinary must have been of opinion, when he directed this issue, that if they could prove the agreement by parole, that was sufficient; supposing that to be my Lord Ordinary's opinion, is it possible to say that his directing that issue, in order that *that* which was matter of fact might be tried by a jury, if the parties chose to send it to a jury, but which, I admit, as matter of fact, the Court of Session were competent to try without a jury, is it possible to say, because these issues were so directed by the Lord Ordinary, that, therefore, the Lord Ordinary had given a judgment that parole evidence was sufficient? I speak of parole evidence without a *rei interventus*. At any rate, all you can say is, that you *imply* that my Lord Ordinary must have had that opinion; but an opinion, in the mind of a judge, unless it is *declared* in *judgment*, is just nothing at all; it must appear in *judgment*, and not appearing in judgment, it may be a mistake and a miscarriage in proceeding to have directed the issue; but to say that the direction of the issue is a judgment, that parole evidence was sufficient to show there was an agreement when it was sent to a jury, to say, whether there was an agreement or not, appears to me to be altogether untenable; and I will take the liberty of saying, that I do not know that the Lord Ordinary can be looked at as having directed an unnecessary proceeding, even if that was the idea; for when one looks at the books, and sees what is said about a nominate contract, and an innominate contract, and what is thought about an *usual* contract, or an *unusual* contract. I do not know but the Lord Ordinary might say, looking at the *ninth* and *tenth* articles of your condescendence, I will not shut you out—prove these facts before a jury—if you can prove that this is a usual contract among merchants, I will not shut you out, and you have in your condescendence alleged it is so; I say, therefore, without going further into it, my Lord Ordinary, whatever be his opinion upon mere parole, cannot, as it appears to me, be represented as having thought that this case was to go upon nothing but parole evidence when it went before the jury.

"When it does come before a jury, my Lord Chief Commis-

sioner's report of the trial upon these issues: 'Whether the defender did, in the month of February 1805, enter into an agreement with the pursuer,' &c. (Here his Lordship read the issues.) Now, my Lords, I observe in the proceedings (I am afraid I am getting to great length here, but this is a case of importance with respect to the Jury Court) if this is not to be considered as what is known in the law of Scotland as a contract of relief, it is a little unfortunate that the terms in which this issue is taken were adopted, because the terms are, whether he entered into a contract to *relieve* him of that bargain, and not only a contract to relieve him of that bargain, but the issue contains an assertion, in fact, that the pursuer had, before the month of February 1805, relieved Mr George Aitken of that bargain; and, I am sure, if it was not considered as a contract *of relief*, those are not the terms which would have been used in this country, but whether it was a contract of relief, it is not a question whether he talked with the party aye or no, but whether, talking with the party, he made a lawful agreement.

"The next question is, 'Whether the defender did not, at 'the same time, agree to pay the sum of £40 sterling to the 'said pursuer, or to the said George Aitken, on condition of the 'bargain being made over to him, the said defender?' Now, when one looks at the condescendence, one cannot help again entertaining some degree of doubt, whether that issue should have been so framed, because if the *time of payment* be an essential in the term of an agreement, and the time of payment was here essential for more reasons than one,—*first*, it was essential considered in itself; *secondly*, it was essential, because it varied the agreement of Callender with Clark, from the agreement which Clark had made with Aitken.

"Then, my Lords, the Lord Chief Commissioner and Lord Gillies report, and 'they call witnesses to prove the bargain be-'tween Clark and Callender. This was objected to by the 'defender's counsel, who contended that the bargain could only be 'legally established by writing, and could not be proved by parole; 'the judges, however, were of opinion, that if the evidence of the 'bargain between Clark and Callender could only rest upon a 'written instrument, the Court of Session would not have sent 'the case to be tried by a jury, but would have decided it them-'selves, either upon the view of the instrument, if there was one, 'or if none, upon the sufficiency of the bargain in point of law, 'for want of writing.' Here it is said, my Lord Chief Commissioner and Lord Gillies miscarried; but really I cannot come to that conclusion myself, because what the judges have finally held, is, *not* that a bargain, where there is a *rei interventus*, or a part *performance* of it, cannot be carried into effect without writing, but that where there was *nothing* but a parole agreement without a

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rei interventus or *part execution, that* cannot serve; and much may depend upon what actually passed in the court at the time this transaction took place, whether there was any matter for a reference or not; but take it as you please, either the opinion in the mind of the Lord Ordinary, or in the minds of the judges who tried this issue, and when I recollect who Lord Gillies is, and who the Lord Chief Commissioner is, and Lord Meadowbank, and Lord Reston; speaking of these four persons, I hope none of them who may be now living, will find any fault with me, if I take leave to say, that in common with the greatest and most eminent of judges in England, they may have fallen into a mistake. Then the Lord Chief Commissioner reports the evidence; now, I have looked with great attention to that evidence, and if your Lordships shall come to the conclusion that this judgment shall be affirmed, it does appear to me satisfactory to say, that taking that evidence, and the summons, and the terms of the issues together, I do not think it would have been at all against the evidence if there had been a verdict, not for the pursuer, but for the *defender;* and I think there would have been a verdict for the defender in this country, upon that evidence.

"My Lords, the case goes back to the Court of Session, and there is a motion made for a new trial, and two interlocutors one of the 2d December 1818, and the other of the 12th January 1819, the first directing counsel to be heard against the motion by the respondent for a new trial, and the other of the 12th January 1819, setting aside the verdict, and directing a new trial to take place, and against these interlocutors there is an appeal to your Lordships. The Court of Session, in directing the trial, must be understood to say, that the evidence in point of law, upon which the verdict had been given for the pursuer, in the first instance, was not such as would maintain that verdict; and it has been argued, I think principally by Mr Stephen, that upon the whole construction of the Acts introducing trial by jury into Scotland, an appeal may be competent against such interlocutor, if the decision of the Court, at the conclusion of the case, affords appealable matter. I speak with deference, when I say, that I do not think there could be an appeal against such interlocutors. Certainly the impression upon my mind from the beginning to the end of our proceedings in legislation here, in reference to matter of trial, leads me to say, that I think there is no right of appeal, and that I think I am not wrong when I recollect how much I have had to do with legislation upon this subject.

"My Lords, there was a new trial, and upon that new trial the parties proposed to give parole evidence, the nature of which is not distinctly stated, certainly, in the bill of exceptions; and here, too, I recollect, Mr Stephen, in his argument for the appellant, gave us some observations which deserved considerable at-

tention upon what the legislature must be understood to mean by this bill of exceptions, when it sent it into Scotland. Without entering into remarks upon these observations, I think I may go the length of saying, that the proceeding upon a bill of exceptions, must, at least in Scotland, so far resemble the proceeding upon a bill of exceptions in England, as that those who are afterwards called upon to determine whether the evidence was properly received, if such be the point of the bill of exceptions, may be able, upon a bill of exceptions, to say, that it is clear upon the bill of exceptions, the judge has done right.

"My Lords, it is stated that 'the counsel learned in the law 'for the pursuers, tendered several witnesses to give parole evi- 'dence in proof of said issues; whereupon the counsel for the 'defender, did then and there pray the said Lord Chief Commis- 'sioner to reject the parole testimony offered to be adduced in 'proof of the bargain in the said issues mentioned, and did main- 'tain that such a bargain could only be legally established by 'writing, and could not be proved by parole; that to this the 'counsel learned in the law for the pursuer, did then and there 'insist that the objection taken to the admissibility of the evidence 'offered, was not well founded in law, and that the parole testi- 'mony offered to be adduced, ought not to be rejected, but that the 'same ought, according to law, to be admitted, to prove the said 'bargain.' Now, with respect to the testimony which it was here prayed the Lord Chief Commissioner that he should reject, the testimony is stated to be 'in proof of the bargain in said issues 'mentioned,' and that it was maintained by the counsel, 'that 'such bargain could only be legally established by writing, and 'could not be proved by parole.' If the matter stopped there, one has to observe upon it, true it is (provided, I mean the law as laid down last in the Court of Session is right), that bargain might have been legally established without writing, provided not only the terms of the bargain were proved by parole, but something further were proved by parole, namely, the *rei interventus*, supposing that which is found in the interlocutor is rightly found; and then in order to guess at what is meant by this bill of exceptions, you must go on, in order to make a fair construction of it, to see what is said on the other side. Now, it is said, 'that the parole testimony offered to be adduced, ought 'not to be rejected, but that the same, according to law, ought 'to be admitted.' Now, if this be taken on the one side, to be an offer of evidence to prove by parole, only where there is *rei interventus*, and upon the other, insisting, that the evidence should not be rejected, though it was a transaction consisting only of a bargain without *rei interventus* or part performance, it is intelligible on both sides; but there appears to be a considerable confusion, if either of them contended that where there was a *rei inter-*

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ventus or part performance, the testimony ought still to be rejected; and if the other contended that if there was a *rei interventus* or part performance, the testimony ought to be received; and it has been determined that when a Court is called upon to determine upon a bill of exceptions that a judge has done wrong, you must see upon the face of the bill of exceptions, that he *has* done wrong before you say so; the reasons which he had given, would lead one to consider him as having had tendered to him, parole evidence of the agreement without anything more, and as having rejected that evidence so tendered to him; and I cannot conceive that this bill of exceptions would have been drawn in the way in which it has been drawn, if we cannot do that better in writing which we often do loosely at the bar. My Lord, we will not only tender you that evidence, but will state what we mean to prove besides that; and if it was properly drawn, there would have been that matter in it, or if improperly drawn, it is a thousand to one but the judge would have directed it to be put in, or have inserted it. Then the judge left it, as his direction to the jury, that as the pursuer had no evidence to produce which was admissible in law, according to the judgment of the Court of Session, in granting the new trial, they should find a verdict for the defender. The jury accordingly gave their verdict for the defender.

"That bill of exceptions goes, according to the statute, before the Court of Session, and that Court of Session gives its judgment upon the point of law, that is to say, the Court of Session decides this, and so far they act very usefully in stating the grounds of their decision (reads their judgment). Then there is a finding about the bill of exceptions. Now, my Lords, on the one hand, it has been contended, that the party cannot appeal from this interlocutor of the 9th March 1819, because of its connection with the trial by jury; on the other hand, it is contended that he *may* appeal from this judgment of the Court of Session; and, speaking again from that impression upon my memory to which I have alluded, I have not any doubt he may appeal from this; and, notwithstanding all we have heard on this case, I do apprehend that the single question before us now to be decided is this, Whether the Court of Session have decided rightly, when they say that there was no reference to homologation (they not only say there is no proof of homologation, but no reference to a proof of homologation), they disallow the exceptions, or in other words, whether their judgment in law that this agreement, which was made not between Gibson, Bayne, and Aitken, but between Callender and Clark, for, from the judgment upon these two agreements we have no appeal, they are all contained together, it seems a little harsh, but so it is, whether this agreement alleged to be made between Callender and Clark, is capable of being denomi-

nated an agreement, by which I mean a lawful binding agreement, and whether the Court of Session are right or wrong in stating that there being no attempt at a proof of homologation, or a proof of *rei interventus*, it is not proveable by parole.

The opinion as to the incompetency of parole in this case.

"My Lords, upon that point I have very little difficulty in stating at this moment, that looking at what is the original nature of this agreement, my opinion is conformable to that which the Court of Session has stated. I am not now entering into the reasons of it, and I am the better satisfied with that opinion, because I do most sincerely think that if this agreement between Callender and Clark had been tried in a court in this country, it would have been impossible that Clark could have maintained an action in order to carry that agreement into execution. The result of the whole, therefore, is, if it shall turn out, in considering the terms of the judgment, that your Lordships shall concur in that which I have felt it my duty to advise your Lordships to adopt, the result of the whole is, that this judgment must be affirmed. If, on considering these points, anything should occur to me that has not yet occurred to me, attending to what has been stated at the bar, and reading all the papers in the cause, I shall be very ready to state any alteration of opinion, if there should be any; but my present opinion is, that the two interlocutors, in respect of the motion for a new trial, and the directing a new trial *cannot* be appealed from; that the judgment of the Court of Session can be appealed from, and that being appealed from, and the question being, whether that judgment is right or wrong, my present opinion and persuasion is, that that judgment is right. I will propose to your Lordships to give judgment in this to-morrow.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £80 costs.

For the Appellants, *John Clerk, Andrew Skene, Henry J. Stephen.*

For the Respondents, *Jas. Wedderburn, Geo Cranstoun.*

WM. and GEORGE WALKER, Esqs., and Sir PATRICK WALKER, . . . *Appellants;*

JAMES GIBSON, Esq., W.S., . . *Respondent.*

House of Lords, 22d February 1819.

VITIATION IN SUBSTANTIALIBUS—DECREE OF SALE.—(1) Held that the commission in which the appellants founded their claim as deputy ushers in the Court of Exchequer, having been vitiated

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by an erasure in the signature of one of the testamentary witnesses, was reducible, and reduced accordingly. (2) The respondent had purchased the heritable right to the office at a judicial sale, and the decree of sale in his favour reserved the deputies right, "so far as they had right by the commission." Held that this clause did not save their right from the exceptions pleadable against it.

This is the sequel of the case reported in Dow, vol. ii. p. 270.

It was an action of reduction raised at the instance of the respondent against the appellants, to reduce a commission appointing them to the office of heritable usher and doorkeeper of the Court of Exchequer in Scotland, upon the ground that the commission was *ex facie* vitiated *in substantialibus*, in consequence of the name of one of the subscribing witnesses to the commission having been written on an erasure.

The Court of Session sustained the reasons of reduction;

May 11, 1814. but on appeal to the House of Lords, that right Honourable House was pleased to "Find that the Commission, 23d "December 1791, is reducible as vitiated *in substantialibus;* "and it is, therefore, ordered and adjudged, that with this "finding, the cause be remitted back to the Court of Session "in Scotland, to apply such finding, and to hear parties "further on all the other points of the cause."

When the cause came back from the House of Lords, a petition was presented to the Court to apply this judgment, and to remit to the Ordinary to hear parties further on the

June 3, 1814. other points of the cause.

The Court found "in terms of the said judgment, that the "commission, 23d December 1791, is reducible, as vitiated "*in substantialibus*, and *quoad ultra*, remit to the next "Ordinary of this Division in the Outer House, instead of "the late Lord Cullen, to hear parties, and to do as his "Lordship shall see cause."

The respondent had purchased the heritable right held by Lord Bellenden in this office at a judicial sale of his Lordship's estate, and held it in virtue of the decree of sale pronounced by the Court, of which no reduction was brought.

The appellants founded on a prior deputation which had been resigned by them. A new one was then granted to George and Patrick Walker, and it was this commission which was the subject of reduction.

To give fuller effect to the discussion, the appellants brought an action of declarator, which was conjoined.

After hearing parties fully upon all the points of the case, the Lord Ordinary (Pitmilly) pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators on "the grounds of the conjoined actions, in the reduction at "the instance of James Gibson against George and Patrick "Walker: Reduces, decerns and declares, conform to the "reductive conclusions of the libel; and, in the action of "declarator at the instance of William and George Walker "against James and Archibald Gibson, sustains the defences, "assoilzies the defenders, and decerns. And on the other "points of the action at James Gibson's instance, appoints "parties' procurators to be ready to debate at next calling." On representation his Lordship adhered. Feb. 21, 1815.

In a reclaiming petition, he pleaded that though the judgment of the House of Lords, had found that the commission 1791, was reducible, yet that the question still remained, Whether it could be reduced at the instance of Mr Gibson, as he had purchased the office *minus* the rights of the deputies; in other words, as the decree of sale set forth, "under the "reservation always to George and Patrick Walker, and the "survivor of them, of all right, title and interest they and "each of them have in the said office, salary, fees, and "perquisites thereof, as deputies therein, during all the days "of their respective lives, *so far as they have right thereto by* "*the commission granted in their favour.*"

In answer, the respondent founded his argument on the latter part of the above clause, stating that the rights reserved to them, were only so far as these were good *by the commission*, but this last being vitiated, was good for nothing.

The Court (Second Division) refused this petition and adhered. June 17, 1816.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Dickson, Tho. Thomson, John A. Murray, Pat. Walker, Jas. Campbell.*

For the Respondent, *Sir Saml. Romilly, John Clerk, Jas. Moncreiff.*

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ALEXANDER v. MARK, &c.

Poor JOHN ALEXANDER, ... *Appellant;*
WILLIAM MARK of Markston, and JOHN MACKIE, ... *Respondents.*

House of Lords, 7th April 1819.

SERVICE—PROPINQUITY.—Circumstances in which the appellant failed to establish his preferable right to succeed and be served heir to the deceased Quinten Alexander.

The respondents having been served as nearest and lawful heirs to Quinten Alexander by a general service obtained before the Magistrates of Canongate, the appellant brought a reduction of that service, stating his propinquity to the said Quinten Alexander, and alleging that he was a nearer heir than the respondents.

After a long proof was led, the Court sustained the defences stated for the respondents, and dismissed the appellant's action.

Mar. 11, 1809. Feb. 10, 1810.

Against these interlocutors the present appeal was brought, stating chiefly the facts and circumstances disclosed in proof on both sides; and commenting upon some written documents adduced for the appellant, which bore intrinsic evidence of forgery. The House of Lords affirmed the judgment of the Court of Session.

For the Appellant, *Sir Saml. Romilly, Fra. Horner, John Cuninghame.*

For the Respondents, *John Leach, Geo. Cranstoun, Adam Duff.*

[Fac. Coll. Vol. xvii., p. 384.]

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THE EARL OF ABOYNE v. INNES.

The EARL OF ABOYNE, ... *Appellant;*
LEWIS INNES, Esq., ... *Respondent.*

House of Lords, 10th July 1819.

RIGHT OF FOWLING—IMMEMORIAL POSSESSION—SERVITUDE.—The respondent claimed a right of fowling in the forest of Birse, belonging to the appellant, and which was conveyed to him along with his lands as a privilege thereto belonging. He had also immemorially possessed and exercised this right, and had given permission to friends to fowl. The appellant had the whole property of the forest vested in him, besides the office of forester, and attempted to reduce the respondent's right. Held

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that there was a right of fowling vested in the respondent, and that he might give permission to his qualified tenants, friends, or visitors to shoot thereon. Opinion that a judicial admission in the summons, that there was such right, was effectual in law to establish it.

This case was of the same nature as the case between the appellant and Mr Farquharson, reported *ante* p. 380.

The respondent, Mr Innes, however, claimed his right of hunting and fowling in the forest of Birse, under a conveyance to him of his lands, "cum privilegio et libertate aucupandi, piscandi, ac cum communi pastura in forestis nostris de Birse, Glencat, Glenavon, et Lendrum," &c. Since his infeftment in this form in 1681, the same rights and privileges had been regularly repeated and expressed in all his subsequent titles.

This, however, did not satisfy the appellant, who brought an action of declarator against Mr Innes, at the sametime that he brought the action against Mr Farquharson. It appeared, that both actions had gone on together, for the interlocutors of the Lord Ordinary (Meadowbank) which disposed of Mr Farquharson's case, contained this finding in regard to the present: "And with regard to Lewis Innes, "in respect of the admission by the Earl in his summons, "that Mr Innes has a right of fowling and hunting over the "forests of Birse and Glencat; and in respect that this privi- "lege implies, from the very nature of it, a right to commu- "nicate the same to friends, gamekeepers, and assistants, when "conferred without an express restriction in that respect: "finds the letters orderly proceeded in the suspension, and "sustains the defences in the declarator, and decerns."* May 12, 1809.

The Earl in a representation made an effort to retract his admission as to the right of fowling, but the Lord Ordinary adhered; and in a reclaiming petition to the Court, the judges of the Second Division pronounced this interlocutor: "Refuse the petition, and adhere to the interlocutor reclaimed "against, in so far as it finds that Lewis Innes has a right of "fowling, or *privilegium et liberatem* aucupandi, over the "forest of Birse and Glencat; but recall the interlocutor, in Dec. 19, 1809.

* Lord Ordinary's Note:—

"I have only to add, that I should have construed Mr Innes' "grant of hunting very differently, had it not been for a judicial "admission, against which I do not think the Earl can be re- "poned."

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"so far as it finds he has a right of hunting, and remit to "the Lord Ordinary to hear parties as to the extent of his "privilege, and particularly, whether it is communicable, as "in the case of the ordinary right or franchise of hunting "and fowling."

The respondent stated, that with respect to the right of *hunting*, as contradistinguished from *fowling*, it was not of the slightest consequence to him, whether he should be found entitled to exercise it or not, because, for many ages past, the only kind of sport furnished by the grounds in question, had consisted in the seizure of winged game, and he had granted permission to some of his tenants on his lands to hunt and fowl for these.

The extent of the respondent's right having thus been remitted to the Lord Ordinary, the respondent pleaded that the right ought to be liberally construed—that the right of seizing and killing wild animals had been common to all, without exception in the earliest period of mankind—that no positive institution existed in the nations of antiquity abridging this right. In the Roman law, it was declared

Inst. l. ii. t. 1, § 12.

"feræ bestiæ et volucres, et omnia animalia quæ mari, cœlo "et terra nascuntur, simul atque ab aliquo capta fuerint, "jure gentium statim illius esse incipiunt: Quod enim nul- "lius est, id naturali ratione occupanti conceditur." It is

Ibid.

indeed, declared, in the same law, that a person shall not hunt on his neighbour's grounds; but the power of the proprietor to exclude intruders, was necessarily inherent in the right of property, and was by no means founded on any notion connected with the preservation of game.

Even on the principles of the ancient forest laws, the right must be favourably construed, because the origin and object of the forest laws was to preserve a cover for the deer, and to provide venison. And even, supposing the forest of Birse still retained its legal character, and privilege as such it must follow, that the respondent truly enjoys a right of *forestry* therein, including even *vert and venison*, or, at least, such as now frequents the ground. That the right of fowling in the forest of Birse was by no means a *servitude* merely, as the appellant contends, but is a right of property. Nor is it what he also alleges it to be, a *personal privilege*, for that would reduce it to a personal servitude, which is a right unknown in our law. The respondent contended that he had, from the general words used in his title-deeds, a right of killing wild fowl in the manner most convenient and beneficial

to himself; and that he had from time immemorial exercised that right, and is consequently entitled to found *on immemorial usage* as the best interpreter of the extent of his right.

The Lord Ordinary (Meadowbank) pronounced this interlocutor: "Having considered these interchanged memorials Nov. 13, 1812. "and condescendences for the Earl of Aboyne, pursuer, and "Lewis Innes, Esq., defender; and observing that the usage "alleged by Mr Innes, prior and subsequent to the decreet-"arbitral 1755, is not controverted by the Earl: Finds, that "the liberty and privilege of fowling, conferred by the de-"fender's titles, is *presumptione juris et de jure*, a grant by a "*verus dominus*, effectually burdening the right of property "in the forest of Birse belonging to the pursuer, with the "office and privilege of forester connected therewith: Finds, "that the liberty and privilege so conferred on the defender, "is a franchise, conferred as an heritable right, rendered an "appendage to the property of Tilliesnaught or Ballogie; "and as it affects a district created a royal forest, under the "guardianship of a forester, and appears to be co-ordinate "and co-effective with the rights of the grantee thereof, must "be considered as a franchise, entitled, as far as it goes, to "the benefit of such an establishment, and to a fair and "liberal construction as to the exercise thereof, according "to use and wont: Finds, that the said privileges may be "lawfully exercised by the defender personally, or by his "gamekeeper, duly authorized for that purpose, or by any "qualified friends whom he may permit, whether his tenants "on Ballogie or not, or whether the defender may be per-"sonally present or not; but always in such a way and man-"ner as not to be abusively exercised or encroach unreason-"ably on, or absorb the general right of fowling as well as "hunting, belonging to the pursuer, over the said forest; and "decerns and declares accordingly. And as the case has "been very ably and learnedly argued in a manner which "does honour to the counsel on both sides, dispenses with "any representation."*

* Note by the Lord Ordinary:—

"The point not being before the Lord Ordinary, he does not think himself entitled to decide it. But he doubts of the competency of granting to the tenant of Ballogie in a manner not recallable for abuse, a permission to shoot. Such a permission, if exercised in a certain way, may be destructive to the game of the forest, yet could not be recalled by Mr Innes, nor easily regulated

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May 25, 1813. June 22, 1813.

On reclaiming petition to the Court, the Court refused the prayer of this petition, and adhered to the interlocuters reclaimed against.

On presenting a second reclaiming petition the same was unanimously refused, "in respect that any abusive exercise "of the defender's right is sufficiently guarded against by the "interlocutor of the Lord Ordinary, adhered to by the "Court."*

The appellant presented another reclaiming petition, having reference to a supposed ambiguity in the Lord Ordinary's interlocutor in regard to the word "qualified," used in reference to his power to grant permission to others. The Court remitted to the Lord Ordinary to hear parties on that point. The Lord Ordinary (Meadowbank) pronounced this interlocutor: "Having considered the petition for Lewis Innes "and remit by the Court, and having heard counsel, and "advised the minutes of debate since put in, and recollecting "distinctly his own meaning by the term 'qualified,' in the "interlocutor of the 13th November 1812, was to avoid "giving any appearance of sanction to the fowling of persons "as assistants, friends, or visitors, who had not taken out "licenses as gamekeepers, or as otherwise entitled to shoot, "and by no means any restricted technical sense of being "qualified under any one statute, or under even statutes "hitherto enacted in contradistinction to statutes that here-"after may be enacted, and being of opinion that the legal "construction of the import of this term is entirely consistent "with the meaning he entertained in pronouncing the inter-"locutor, and that it is competent for this Court to declare "that legal construction after, as well as before, the lapse of "the reclaiming days: Finds, that by the expression in the

Nov. 12, 1813.

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by legal interposition; and yet the forester, the Ordinary thinks, might have such ground of complaint, as that Mr Innes ought to recall the permission so abused, were it in his power so to do. If it is conferred by tack, it therefore should be declared subject to the recall for excessive or abusive use."

* Opinions of the judges:—*Vide* Fac. Coll. Lord Meadowbank, in giving his opinion as one of the judges, seems to have altered his original opinion as to the respondent's right, founding it chiefly on his titles and possession, and not on the *admission* in the summons. His Lordship stated, "I think there is a good "right *without the confession;* there is the long usage of the tenant "both before and after the decree-arbitral."

"interlocutor 'any qualified persons whom he may permit,' "whether his tenant at Ballogie or not, is meant any persons "whom the petitioner may permit, that may lawfully exercise "that permission, whether his tenants in Ballogie or not, and "that this is the true construction of the passage of the inter-"locutor in question, and decerns."

Against this interlocutor the appellant reclaimed by petition to the Court, but the Lords adhered. Dec. 7, 1818.

Against these interlocutors the present appeal was brought to the House of Lords, by the appellant.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Sir Sml. Romilly, Thos. W. Baird, Fra. Horner.*

For the Respondent, *John Leach, Hugh Lumsden.*

[Fac. Coll., Vol. xix., p. 394.]

WILLIAM MAULE, Esq., great grandson of Dr Henry Maule, Lord Bishop of Cloyne, in the Kingdom of Ireland, and heir-male and representative of the family of Panmure in Scotland, pursuer, . . } *Appellant;*

The Honourable WM. RAMSAY MAULE of Panmure, defender, . . . *Respondent.*

House of Lords, 10th July 1819.

PRESCRIPTION—ENTAIL OF LEASES—DECREE-ARBITRAL—REDUCTION—RES JUDICATA—HOMOLOGATION.—The appellant claimed certain property, as well as leases of property, part of the Panmure estate, settled on him by deeds of entail. The respondent stated that these entails had been held by a decree of the Court in 1782, to be prescribed, and he also founded on a decree-arbitral, wherein these rights were put in issue and finally settled. The appellant brought a reduction of this decree-arbitral, but not of the decree of the Court. The Court of Session repelled the reasons of reduction; and on appeal to the House of Lords, the cause was remitted for reconsideration, and under this remit the Court generally sustained the defences pleaded for the respondent. Reversed in the House of Lords,

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and held, *first*, that the instrument purporting to be a decree-arbitral, ought to be reduced; and second, that the interlocutor of Court in 1782, was not to be considered as final and conclusive against the respondent with respect to the leases in question. *Quoad ultra* affirmed.

This is an appeal in regard to the reduction brought of a submission and decree-arbitral, which had followed on a decision in a depending cause, pronounced by the Court of Session of 1st and 4th March 1782, which sustained the entails of the leases of Panmure and Brechin, parts of the property belonging to the family of Panmure, but held the deeds of tailzie (1730) of the estate of Kelly and Balumbie were cut off by the negative and positive prescription. In this competition, Thomas Maule, the appellant's father, had claimed the whole property in dispute, as heir-male under these deeds of entail, executed in 1730; and he was opposed by the late Earl of Dalhousie, for himself, and as administrator-at-law for the respondent, his second son, founding on a settlement adverse to *the entails*, which had been executed by the late Earl of Panmure, in October 1781, in favour of the respondent.

The grounds of reduction were, 1st, That, "although *ex* "*facie* of the foresaid pretended submission, it bears to be a "reference of the depending processes, and various points of "dispute between the parties therein named, yet, in fact, it "was not a submission, but only a bargain, covenant, or "agreement of a nature essentially different from what in "law is held and understood to be a regular and proper sub-"mission or reference; and the said pretended decreet-"arbitral following thereon, is false, feigned, and destitute of "truth. It sets forth that the arbiters had considered the "claims of the parties, and had God and a good conscience "before their eyes, and were ripely advised therewith." Whereas, the truth is, that "the said arbiters never heard "parties on, nor considered their claims, nor had any power "whatever so to do, under the said pretended submission. "They were fettered and bound down by a previous agree-"ment, to pronounce the said pretended decreet-arbitral in "the terms in which it is given forth; and were not at "liberty to exercise, nor did they exercise their own judg-"ment and discretion upon the questions apparently sub-"mitted to them. 2d, The parties to the said pretended "submission, bargain, covenant, or agreement, whereon the

"said pretended decreet-arbitral proceeded, had no power "to bind the pursuer, as heir of tailzie, to give effect to the "same, or abide thereby. And, therefore, the same, with "the service of the pursuer as heir male and of provision "under the said pretended decreet-arbitral, and whole acts "and deeds done by the pursuer, on the ground and under "the erroneous conception of its being a fair decreet-arbitral, "pronounced upon a solemn and legal submission by arbiters "at full liberty to exercise their own judgment upon the "points apparently submitted to them, are null and void so "far as regards the pursuer, and not binding on him. And "it being so found and declared, the said Hon. William "Ramsay Maule, defender, ought and should be decerned "and ordained by decreet foresaid, to flit and remove himself "and servants from the lands," houses and parks mentioned therein.

In defence to this action, the following defences were given.

1st, The two deeds of entail and separate obligation on which the pursuer founds his title to insist in the present action, and his alleged general service, in terms thereof, have not been produced in process.

2d, Among the deeds sought to be reduced, is the disposition and deed of entail executed by William, Earl of Panmure, of the lands, baronies and others therein enumerated, and particularly of the lands and baronies of Kelly and Balumbie, in favour of himself and his heirs of tailzie therein mentioned, by virtue of which disposition and tailzie, the defender now possesses the lands. But, as the heirs of tailzie substituted to the defender, have an interest, they ought to have been called.

Separatim.—The lands of Balumbie were, several years ago, sold under the authority of an Act of Parliament for redemption of the land-tax, and the present proprietor of these lands ought also to be called.

3d, The deeds of entail do not afford any title to the pursuer to insist in the present action, as they have long ago been extinguished by prescription, both positive and negative.

4th, It has been already determined by this Court, as far back as March 1782, that the two deeds of entail and obligation libelled on, were extinguished by prescription, both positive and negative, and the decree of the Court was shortly thereafter extracted. The subject matter of the present action is, therefore, *res judicata.*

5th, Even on the supposition that the pursuer had any

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existing title under the deeds libelled on, he could not be heard in the present action, until he had previously set aside the extracted decree of this Court, in March 1782.

6th, Homologation of the transaction gone into.

The Court of Session repelled the reasons of reduction, and against their judgment, an appeal was taken to the House of Lords.

March 9, 1813. *Vide* Dow's Reports, vol. iv.

Under this appeal, the case was fully heard in the House of Lords; after which,

The LORD CHANCELLOR said,*

"My Lords,

"The appellant is the great grandson of Dr Henry Maule, Bishop of Cloyne, and heir male of the family of Panmure in Scotland.

"The appeal is brought against an interlocutor of the Second Division of the Court of Session of the 9th of March 1813 (which his Lordship read).

"The Court was equally divided at pronouncing this interlocutor, till Lord Pitmilly was called in. Those Lords who were in favour of the interlocutor said it was a case of great difficulty.

"It is unnecessary for me to state to you the proceedings out of which the judgment of the Court of Session, in 1782, arose. These are detailed in the first, second, and third pages of this paper of the appellant's.

"On the 1st of March 1782, the Court pronounced this interlocutor (Here his Lordship read the same). Your Lordships will observe that in this interlocutor, the Court found that certain entails of the estates of Kelly and Balumbie were cut off by the positive and negative prescription; but they found that the entail made as to certain leases still subsisted, and that Lieutenant Maule had a right to take up these by service. The property which was the subject of these leases, is stated to have been very valuable.

"It appears that an appeal had been entered against this judgment, in regard to the leases, on the part of the Earl of Dalhousie; but an arrangement was afterwards entered into, which superseded this appeal. The discussions, with regard to this arrangement, appear to have been carried on between Mr Campbell, afterwards Sir Ilay Campbell, counsel for the Earl of Dalhousie, and Mr Wight, counsel for Lieutenant Maule. It was completed in what was called a submission, which bore date the 30th of March 1782, and in what was termed an award, which was made as early as the 2d of April thereafter. That award was in substance as follows:—

(Here his Lordship read the substance of the decree-arbitral from the fourth page of the appellant's case, affirming the inter-

* Taken by Mr Robertson

locutor so far as regarded the estates of Kelly and Balumbie, and reversing that part of it which regarded the leases given to Lieutenant Maule; but granting £3500 to be vested in trustees for Lieutenant Maule and the substitute heirs.)

"I should have noticed that Lord Braxfield, then one of the judges of the Court of Session, had been named oversman in the submission, and it is said to have been principally owing to the weight of his opinion, that the leases had been given to Lieutenant Maule, in the judgment of 1st March 1782; I should have noticed also that, according to the submission, the award was to be given in eight days from its date.

The appellant's case goes on to show why no proceedings had been taken on his part till 1809; but that various documents having then been discovered, he then brought his action, calling for production of the submission and decreet-arbitral, and for reduction of them.

(Here his Lordship read the conclusions of the appellant's summons.)

Your Lordships will observe that this action insists that there was in fact no true submission and decreet-arbitral, but an agreement which was put into that form, and claims that the respondent should be removed from possession of the subjects contained in the leases, and should account for the profits. What relief the Court would have thought the appellant entitled to, if they had thought this a bad submission and decree-arbitral, we don't know; the majority of the Court were of an opinion which precluded the necessity of there stating what ought to be done, if the submission and decree-arbitral were set aside.

"In these papers I find several questions very ably discussed, which it is not necessary for us to give any opinion upon.

"The first question made in the appellant's case is, If the interlocutor of 1st March 1782, be well founded or not? This may be a very important question, but the Court having given no opinion upon it, we cannot give an opinion upon it; where no decision is given in the Courts below on any point, your Lordships religiously adhere to giving no opinion upon that point; this is more particularly to be attended to in cases from Scotland. In the course of the able argument of Mr Murray,* I intimated that we could give no opinion as to this, and that the only question before us was, if this was a transaction or a submission and decree-arbitral. The same observation applies to the second point made by the appellant, namely, that Lieutenant Maule had no power to enter into a transaction that should affect his son the appellant, then a minor. A similar observation may be made, on the point of *homologation;* it was said by some of the judges, that the homolo-

* Now Lord Murray.

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gation could only be construed to extend to this as a decree-arbitral. If your Lordships shall be of opinion that this was a decree-arbitral, homologation was not necessary; if you shall think otherwise, we have no judgment of this Court upon this matter of homologation.

"The only question before us is, if this be a real submission and decree-arbitral, or only an agreement in that form.

"When I come to discuss this question, it would be a most painful duty to me, if I thought that by any opinion I had formed, I acceded to imputations which have been made, upon the arbitrators, from the bar, or in these papers. In the early part of my life, I have stood at that bar with Mr Wight; with regard to that eminent person, Sir Ilay Campbell, I have known him long and intimately.

"We should impute much too strongly against mankind, if we took this up in the manner it has been urged. These gentlemen, who were counsel on opposite sides, appear to have fallen into this mode of arrangement by decree-arbitral.

Vide ante, vol. iii., p. 378.

"We heard a good deal of the case of Mr Mackenzie and the York Buildings Company. I know that Lord Thurlow never thought of imputing immoral conduct to Mr Mackenzie, and it was matter of perfect surprise to me now to hear that any imputation of that kind could be brought against him.

"I remember, it was stated, that even judges had been purchasers at judicial sales. But the proceeding was dangerous, not because Mr Mackenzie had not given as much as another, but because, as he had more knowledge of the subject than any others could have, the policy of the law did not permit him to be a purchaser.

"If we come to the question, if this was a real submission, and decree-arbitral or not, I hold it to be the duty of an arbitrator, to go into that room, to make an award precisely as a judge; though he is named by one party, he is indifferently arbitrator between both; and his duty to both is the same as the duty of the king's judges towards the king's subjects.

"I call your attention again to the judgment of 1st March 1782. It finds that Lieutenant Maule had a right to take up certain leases, which are said to have been worth £50,000. I lay the value, however, entirely out of the question.

"Against this judgment, Lord Dalhousie entered an appeal to this House. This is noticed in Mr Wight's letter of the 24th of March 1782, to have been a matter understood between the parties.

(Here his Lordship read this letter.)

"Something was said of the expression '*flurried a little*' in the postscript of this letter. I lay this out of view, however, altogether.

"Another letter appears from Mr Wight, of the 29th of March, the day before the submission was entered into, which is very important.

(Here his Lordship read the same.)

"This is the statement of Mr Wight, who must have held the character of arbitrator as well as Mr Campbell, otherwise the award was void. Do I characterize this letter too high, when I say, that it affords evidence that Mr Wight spent three hours with Mr Campbell, the other arbitrator, discussing what one party should take and the other should give for these leases; the one struggling to bring the other to a higher sum than £3500, which the other positively refused to give; and that thereupon advised Lieutenant Maule to accept this offer, and he requests to know, whether Lieutenant Maule meant to act upon the terms proposed by the party, as they *expected a speedy answer*.

"The submission bears date the 30th of March. The scroll has been discovered drawn out by Mr Leslie, Lord Dalhousie's agent, who, you will recollect, is mentioned in the letter of the 24th of March, in which it is said, that if he had been at home, there would have been no attempt at a service of the appeal.

"If there had not been a speedy answer, the scroll of the submission could not have been drawn out as we see it, and corrected as we see it afterwards was.

"Mr Leslie draws it out, stating that a treaty was entered into between the counsel for the parties and a verbal agreement made, of which the import is set out in the scroll.

(Here his Lordship read the draft of the submission.)

"This scroll, of considerable length, must have been drawn out by Mr Leslie between the afternoon of 29th March, and the 30th, when it was executed. It must have been drawn out either from information or conjecture; whether from the one or the other your Lordships will have to infer from what was written in the letter of the 29th of March.

"Mr Campbell strikes out of the draft, all that relates to the agreement, and makes it an ordinary submission.

"On the 2d of April, the arbitrators proceed to make their award. It will be recollected, that an interlocutor had been pronounced by the Court, on the 1st of March 1782, finding that the entails of the estates of Kelly and Balumbie were cut off by prescription, and that these estates belonged to the respondent; and finding as to the leases (chiefly as was said from the weight of the opinion of Lord Braxfield, who had been named oversman in the submission) that these belonged to Lieutenant Maule as heir of entail.

(Here his Lordship read the first part of the award.)

"Here you see, that the arbitrators make the interlocutor in all respects in favour of Lord Dalhousie, and in all respects against Lieutenant Maule.

"Then we come to a clause, of which I wish to speak with circumspection; but, I am persuaded, that no court of law in this

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country could sustain an award with such a clause; for in it both arbiters are of opinion, both for and against each party.

(Here his Lordship read that clause in the award, which begins with these words, and 'as we conceive it to be just and reasonable,' &c.)

"We find here given, the very sum mentioned in the letter of the 29th of March; it does everything that had been recited in the draft as the verbal agreement of parties, except in giving the sum awarded in remainder to the heirs of entail.

"Then we have a clause to prevent any attempt being made to break the award.

(Here his Lordship read the same).

"Upon the whole, we find mentioned in Mr Wight's letter, the sum that Lord Dalhousie had agreed to grant. We see the scroll which was intended to carry this into effect. We see this scroll altered so as to resemble an ordinary submission, and two days afterwards we find an award, carrying into effect the very things which we see had been previously agreed to.

"I don't think that we should consider this as affecting the characters of the parties; but we must deal with this as an ordinary case. I cannot consider this as any thing more or less, than an agreement under the colour of a decree-arbitral. I am of opinion that we must set aside this as a decree-arbitral.

"What will be the consequences of this, I don't know; these consequences were not gone into by the Court, and cannot be gone into here.

"It was proposed to us to decide at once in favour of Lieutenant Maule, on the further points, and not to send the cause back; but this, according to my view, cannot be done.

"I should propose, therefore, that your Lordships should find that there was no decree-arbitral in this case, and remit the cause to the Court to proceed accordingly."

May 10, 1816.

The following judgment was then pronounced: "Find, "That in this action and proceeding between the present "appellant and respondent, the alleged submission, and "alleged decree-arbitral, of the respective dates of the 30th "March 1782, and 2d April 1782, ought not to be con-"sidered as being, or having in law the effect of, a submis-"sion or decreet-arbitral; but as a form adopted, in which "an agreement, previously made between Thomas Maule, the "pursuer's father, and George, Earl of Dalhousie, parties to "the said submission, was concluded; and remit to the Lord "Craigie, Ordinary, to hear the parties, and to proceed "accordingly to what shall appear to him to be just and "consistent with this finding."

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On the case returning to the Court of Session, Lord Craigie, the Ordinary, ordered memorials on the whole cause to be boxed, with a view to report the case to the Court; and this having been done, further informations were ordered by the Court, and the Lords pronounced this interlocutor: "The Lords having resumed consideration of Dec. 2, 1817. "the mutual memorials for the parties, with the additional "informations and whole circumstances of the case, sustain "the defences pleaded for the defender, assoilzie him and "decern."

Against this interlocutor the present appeal was again brought to the House of Lords.

Pleaded for the Appellant.—1st, The plea of homologation does not apply, because the acts founded on were, in the first place, done under mistake or misapprehension. This mistake proceeded not from *inadvertency alone*, but was occasioned by some deception used by the other party, for the purpose of obtaining homologation. Homologation is the acceptance of a transaction or deed by an approbatory act of the party. Approbation, however, is an operation the mind is incapable of without a previous *knowledge of the thing to be approved.* Knowledge of the thing to be homologated is, therefore, the essence of homologation; and unless that essence is entirely given up, it is impossible to hold that acts done as applicable to deeds, under *the belief* that they were a real submission and decreet-arbitral, can be held applicable to the same deeds, after they have been discovered to be quite different from what the party *believed them* to be, when the acts were committed.

If the appellant disbelieved that those instruments were a transaction, it does not follow, as a necessary *consequence*, that he must have believed them to be a decreet-arbitral, because they might have been neither. But if he did *believe* them to be a decreet-arbitral, it does follow, as a *necessary consequence*, that he could not believe them to be a transaction; for these two things are quite different, and he could not believe them to be two different things at one and the same time. The most effectual way, therefore, in which the appellant can prove his ignorance, that the instruments in question were a transaction, is to bring forward such evidence as will fully convince all, that *he believed* them to be really a submission and decreet-arbitral, as contra-distinguished from a transaction; and it appears, the respondent has himself furnished that evidence, as follows: By the letter from the appellant to

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the respondent, of 7th September 1794. His letters, also, to the trustees, prove that he was under the impression that the instruments in question were a submission and decreet-arbitral.

2d, If the instruments in question were also a transaction, they were none such as could be binding on the appellant. The respondent has all along pleaded, that these instruments bound the appellant as a transaction, even though not good as a submission and decreet-arbitral. How they were made to assume, also, the form of a transaction, has not been explained. But, now, that these instruments are set aside as a submission and decreet-arbitral, they can now be supported and set up only as a transaction, *in equity*. It is a fixed rule in equity, that where a deception has been made use of, either *suppressione veri*, or *suggestione falsi*, it renders the transaction, whatever may have been its nature, utterly void. As to how far deception was made use of against the appellant, he will trouble the House with a single observation, in addition to what is apparent from the narrative in this appeal. But, as the instruments in question are now to be pleaded up as a transaction of Lieutenant Maule's valid *per se*, it is necessary to show that deception lies at the root of it, and was practised, in a most material and important particular, against *Thomas Maule himself*. In particular, in consequence of the representation of Mr Wight, advocate, in his letter to Thomas Maule, which set forth that, in the event of his and his son's death, Lord Dalhousie would exclude his daughters, and upon this representation, £500 of his claim was given up, although the point of law was clearly erroneous.

Further, the instruments cannot be held good and valid as a transaction *per se*, because, where they have been set aside on grounds which strike at the validity of all instruments—when they are reduced on the head of force or fear, or of fraud, or circumvention, they cannot stand good to any other legal effect. It was not a transaction by Thomas Maule himself, under the pretence that by himself alone he could effectually cut down the entails, for he acted as administrator for the appellant, *whose right*, under the entails, was thereby acknowledged; and therefore the transaction, in fact, was not Thomas Maule's own transaction. Again, the forfeiture, in the event of challenge, was levelled against the appellant *nominative*, which was another direct acknowledgment of his right. Again, Lord Dalhousie sold his claim under the en-

tails for the above abatement of £500, or what is the same thing, if not worse, Thomas Maule was made to believe so. The validity of the entails, therefore, was part of the *compromise*, which cannot be pleaded against itself. In fact, the whole proceedings in 1782, on both sides, went on the principle, and were concluded on the understanding, that the entails were valid; and now, in 1818, when it is wanted to get rid of them, they are held to have been the reverse of valid.

3d, Even supposing the decision in 1782 still open, without any previous reduction, the respondent does not represent the original lessees, in the tack of the Mansion House and Parks of Brechin, &c., or Lord Panmure, in the leasehold rights, and therefore is not entitled to enter into any question of prescription regarding them.

4th, That the decision of the Court of Session, 4th March 1782, sustaining the entails of the leases of Panmure and Brechin, was well founded.

Pleaded for the Respondent.—1st, If the entails of the leases founded on were ever effectual in law, they had been entirely cut off by prescription, before the claim was made on them by Lieutenant Maule, the appellant's father, in 1781.

2d, The agreement, or transaction, by which Thomas Maule, for himself, and the appellant, his son, settled a depending lawsuit of very doubtful issue, and for a valuable consideration renounced to the landlord, every claim under the entails or leases, followed by possession, was in itself, an effectual transaction to bar the present claim.

3d, The pursuer is barred from challenging the agreement by his representation of Thomas Maule, and by homologation.

After hearing counsel,

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby reversed, so far as it is inconsistent with the order of this House of the 10th of May 1816, remitting the cause back to the Court of Session to review the interlocutor of the 9th of March 1813, complained of in the former appeal, and so far as it sustains generally the defences pleaded for the defender, and except as hereinafter expressed. And it is further ordered and adjudged, that the instrument of 2d April 1782, purporting to be a decreet-arbitral, ought to be set aside and reduced as a decreet-arbitral,

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affecting any rights of the appellant. And it is declared that the interlocutor of the 1st of March 1782, is not to be considered as final and conclusive against the respondent, with respect to the leases in question. And, therefore, as to so much of the appellant's action of reduction and declarator, as seeks a declaration of the rights of the appellant to such leases, it is further ordered and adjudged, that the said interlocutor of the 2d December 1817, be affirmed, but without prejudice as to any question between the parties, in any other action touching any property comprised in the deeds of tailzies in the pleadings mentioned.

For the Appellant, *Alexr. Macconochie, Geo. Cranstoun, Wm. Erskine.*

For the Respondent, *John Clerk, Jas. Moncreiff, H. Brougham, John A. Murray.*

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HUNTER, &c. v. M'GOWN, &c.

[Fac. Coll., Vol. xvi., p. 242.]

JAMES HUNTER & Co., Merchants in Greenock, ... *Appellants;*

ARCHIBALD M'GOWN, Merchant in Greenock, and Others, Owners, and JOHN M'GIBBON, Master of the Gabbart "Janet" of Greenock, . . *Respondents.*

House of Lords, 12th July 1819.

LIABILITY OF CARRIERS BY WATER—DAMAGES FOR LOSS BY FIRE.—Goods were lost by fire while on board a lighter at Greenock, to be carried to Glasgow. In an action for the value of the goods destroyed, against the owners of the lighter. Held that they were protected by the Act 26 Geo. III. c. 86, exempting shipowners from loss or damage to goods by fire. In the House of Lords, remitted, with a declaration that the Act did not apply to owners of gabbarts or lighters engaged in inland or river navigation.

The produce of *foreign markets* arriving in the Clyde, was (at the time of this appeal) discharged at Greenock and the Port of Glasgow, from the large vessels in which it was imported, and it was afterwards carried from these places to Glasgow and elsewhere, in small craft called gabbarts or lighters, which ply upon the river Clyde, and Forth and Clyde Canal.

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Upon the 7th January 1807, the appellants shipped at Greenock, cotton wool on board the gabbert "Janet" of Greenock, to the value of £1345, 16s. 8d., for which they took the master's receipt, acknowledging to have received the same in good condition, and obliging himself to deliver the same in Glasgow, "in like good order, danger of navigation "excepted, on being paid customary freight."

By the regulations of the harbour of Greenock, made under the express authority, and in strict observance of an Act of Parliament (26 Geo. III. c. 86), the kindling of fire on board any vessel, while in the harbour, is strictly prohibited; but notwithstanding this regulation, the master of the "Janet" kindled a fire on board of her while in the harbour, which communicated to the vessel and her cargo, and part of the appellant's cotton wool was thereby consumed, and remainder greatly damaged, whereby a loss was sustained of £572, 17s. 2d.

In these circumstances, the appellants brought an action against the respondents, as owners of the gabbert, before the High Court of Admiralty, for the value of the cotton wool, in which, after various steps of procedure, the Judge-Admiral was pleased, of this date, to pronounce the following interlocutor:— Jan. 1, 1808.

"Having advised this additional condescendence and former "proceedings, finds that the pursuers have condescended on "no law, bye-law, fact, or circumstance, which can have the "effect of subjecting the owners of the gabbert or lighter "in question, in any part of the damages pursued for; there-"fore, in respect of the statute, 26 of his present Majesty "Geo. III. c. 86, assoilzies the said owners, finds them en-"titled to their expenses, and decerns."*

This judgment having been brought under the review of the Court of Session, the Lord Ordinary (Armadale), was pleased, of this date, to pronounce this interlocutor:—"Having Jan. 22, 1811.
"considered the mutual memorials, and whole proceedings "in the reduction, repels the reasons thereof; and, in the "suspension, finds the letters orderly proceeded, and decerns: "Finds expenses due, and appoints an account thereof to be "given in." On representation, his Lordship adhered. On Mar. 17, 1811.
reclaiming petition to the First Division of the Court, the Court also adhered. May 10, 1811.

* Note by the Judge Admiral:—

"This interlocutor has nothing to do with M'Gibbon, the master."

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Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, The carriers of goods by sea or land are bound to make good all loss or damage sustained on goods entrusted to them, unless such loss or damage is produced by the act of God or the king's enemies.

It is plain, from the preamble of the Act 26 Geo. III. c. 86 (which, the appellants plead, exempts from loss occasioned by fire), that it is applicable to ships and vessels employed in general commerce, and not to craft employed in transporting goods upon canals and navigable rivers.

It requires a large capital to fit out a ship of considerable size for sea, and it was a great discouragement to invest money in this way, that when owners were, by accidental fire, deprived of their own property, they were liable to others for the value of such property as might, at the time, be on board their vessels. To remove this discouragement, which was supposed to operate against the increase of our shipping, was the declared object of the legislature in passing the statute in question, and similar motives have induced the legislature to pass several Acts for the relief of shipowners. But, had it been the intention of the legislature to extend this statute to common carriers by water, the same policy must have induced them to extend it to carriers by land also; in so far as the fitting out a waggon of the first class, with a suitable team of horses, requires the investment of a larger sum of money, than fitting out a gabbert of the first class; and the same observation applies to waggons and gabberts of smaller dimensions. When, however, it is considered how many millions worth of property is annually transported by means of inland navigation, and how very much the safety of that property depends upon the judicious selection of servants to conduct it, owing to the continual opportunities such men have of neglecting their duty, it can never be for a moment supposed, that if the legislature had intended to release to so very great extent, the responsibility of common carriers, it would have been left to the courts of law to have made this out by implication. But, if there was, at any time, room to doubt the meaning and intention of the legislature in passing the aforesaid Act, it now no longer exists, for, in an Act passed in the 53 of Geo. III. c. 159, for the relief of shipowners, it is expressly provided, "That nothing herein "contained, shall extend, or be construed to extend, to the "owner or owners of any lighter, barge, boat, or vessel of

"any burden or description whatsoever, used solely in rivers "or in inland navigation."

2d, This leaves the question free of the Act, and to rest at common law on the principles applicable to common carriers; and under such, the respondents are liable to make good the loss occasioned by their fault or the fault of their servants.

Pleaded for the Respondents.—1st, The Act of Parliament founded on by the respondents, expressly enacts, that no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good any loss or damage by fire which may happen after the time therein specified, to any goods or merchandise put on board such ship or vessel.

2d, There is no ground stated why the vessel or gabbert in question did not fall within words of the statute, and, therefore, the respondents are entitled to the benefit and protection thereof.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

"My Lords,*

"There was a cause which was heard sometime ago before your Lordships, in which James Hunter & Co., merchants in Greenock, are appellants, and Archibald M'Gown, merchant in Greenock, and others, owners, and John M'Gibbon, master of a certain craft, on a navigable river, called a gabbert, in Scotland, which I take to be of the nature of a lighter, are respondents. The case states, that on the 7th day of January 1807, the appellants shipped, at Greenock, cotton wool on board the gabbert "Janet" of Greenock, to the value of £1345, 16s. 8d., for which they took the master's receipt, acknowledging to have received the same in good condition, and obliging himself to deliver the same in Glasgow, in like good order, danger of navigation excepted, on being paid customary freight; the appellants further suggested that, by the regulations of the harbour of Greenock made under the express authority, and in strict observance of an Act of Parliament, the kindling of fire on board any vessel while in the harbour, is strictly prohibited, but, notwithstanding this regulation, the master of the "Janet" kindled a fire on board of her while in the harbour, which communicated to the vessel and her cargo, and part of the appellants' cotton wool was thereby consumed, and the remainder greatly damaged, whereby a loss was sustained of £572, 17s. 2d.

The appellants, in consequence, brought an action against the

* Taken from Mr Gurney's Short-hand Notes.

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respondents, as owners of the gabbert, before the High Court of Admiralty, for the value of the cotton wool, and the Judge-Admiral was pleased, by his interlocutor, to state that, in respect of the statute of the 26th of his present Majesty, cap. 86, he assoilzied the owners, found them entitled to their expenses, and decerned. My Lords, that statute enacted 'That no owner of 'any ship or vessel shall be liable to make good any loss which 'may happen to any goods or merchandize, &c., that shall be put 'on board any ships or vessels where damage is done, in conse-'quence of any fire happening on board the said ship or vessel.' This was afterwards brought before the Lord Ordinary, and he, by an interlocutor of the 22d of January 1811, and several consecutive interlocutors, in substance affirmed the decree of the Judge-Admiral.

"My Lords, there were several points in this case; first, it was discussed, what was the law of Scotland with respect to the liability of carriers in general; in the next place, that whatever might be the liability of carriers in general, the regulations with respect to the harbour of Greenock, which prohibited the kindling of any fire on board any vessel, would make the owner of any gabbert liable, whatever might be the liabilities, according to the general law of Scotland, and the decision proceeded expressly upon the supposition that the statute of the 26th of his present Majesty, had exempted the owners of this sort of craft, as falling under the denomination of a *vessel*, from damages in respect of the loss sustained. There was a great deal of argument at your Lordships' bar upon the meaning of that statute of the 26th Geo. III., and, after hearing that argument, it was conceived that it was a case in which it might be proper to have the assistance of his Majesty's Judges, and to have it argued before them—the case has therefore stood over a considerable time. It has been found utterly impossible, such is the pressure of business on the judges in the Courts below, to procure their attendance upon this cause; I have, however, looked very anxiously into the Acts of Parliament on this subject, and I have had the assistance (though not of all the judges) of the Chief Justice of the King's Bench, who happens, in the course of his practice and experience, to be particularly well master of the meaning of this Act of Parliament, relating to ships and vessels, and I have no hesitation in saying, that I am of opinion, that that Act of the 26th of His Majesty, cap. 86, relates only to ships and vessels usually occupied in sea voyages, and that it is not an Act of Parliament which gives protection in cases of small craft, lighters, and boats and so on, concerned in inland navigation; the result of that is, if that is a right opinion, and I really do not entertain any doubt about it, that if this judgment has proceeded upon the supposition, that this statute protected the persons against whom the claim of damages

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was made from being liable, that in *that* respect this judgment must be considered erroneous.

"There remains behind the question, what is the extent and nature of the liability of Scotch carriers? Our law, with respect to English carriers, cannot decide that, nor the point how far the regulations of this particular harbour of Greenock, would make the master or owner of a vessel liable. It appears to me that the right course will be to find that the gabbert or lighter called the "Janet," mentioned in the pleadings in this cause, is not to be considered a ship or vessel within the extent and meaning of the statute of 26th Geo. III., c. 86, and with that finding, to refer the cause to the Court of Session to review the interloctutors complained of, and do what is just and right, consistent with this finding. That will enable the Court of Session to find, whether by the law of Scotland, independent of this statute, or any regulations relating to the harbour of Greenock, there is any such liability created, and it will certify to the Court of session, that the liability is not taken away with regard to vessels engaged in this species of navigation, by that statute, which they have considered as a statute applying to this case. I would now move the judgment in the terms I have submitted to your Lordships."

Ordered accordingly.

The Lords find that the gabbert or lighter the "Janet," is not to be considered as being a ship or vessel within the intent and meaning of the statute of the 26th of his present Majesty, c. 86. And it is ordered, that with this finding, the cause be remitted to the Court of Session to review the interlocutors, and do therein as may be just and consistent with this finding.

For the Appellants, *Wm. Clerk, Wm. Buchanan.*

For the Respondents, *Sir Saml. Romilly, J. Cunningham.*

[Fac. Coll. et Hunter's Landlord and Tenant, vol. i., p. 81.]

[General Declarator joined with Harestanes.]

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MONTGOMERY, &c. v. THE EARL OF WEMYSS.

JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq. of the Strand, London; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq. of the Inner Temple, Trustees of the late Duke of Queensberry, and ALEXANDER WELSH, Tenant in Easter Harestanes, . . . } *Appellants;*

The EARL OF WEMYSS, . . . *Respondent.*

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MONTGOMERY, &c. v. THE EARL OF WEMYSS.

House of Lords, 12th July 1819.*

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—GRASSUM.—In the Neidpath and March entail, there was no prohibition against granting leases or taking grassums, but there was a prohibition "to sell, alienate, or dispone the lands." There was a permissive clause allowing the heirs of entail to grant leases for "their own lifetimes, or the lifetimes of the "receivers thereof," but "without evident diminution of the rental." The late Duke granted a lease of Harestanes for fifty-seven years, and took a grassum. Held (1), That a lease for fifty-seven years was an alienation; and that it was not in the Duke's power to grant such lease. (2), That a lease, granted with a grassum taken, was also an alienation. Affirmed in the House of Lords.

In 1686, the Earl of Tweeddale by disposition, of that date, sold and disponed the barony of Neidpath to William, Duke of Queensberry, in life-rent, and Lord William Douglas, second son to the Duke, in fee. This disposition contains clauses prohibiting Lord William Douglas and the other heirs of tailzie, therein mentioned, "to sell, alienate, or dispone" the lands, or to contract debt, with a permission to "set tacks "of the lands during their own lifetimes, or the lifetimes "of the receivers thereof, the same being set without evi- "dent diminution of the rental."

In the year 1693, Lord William Douglas, son of William, Duke of Queensberry, having intermarried with Lady Jane Hay, the second daughter of the Earl of Tweeddale, the lands and barony of Neidpath, and various other lands and baronies, lying in the county of Peebles were strictly entailed in their contract of marriage upon Lord William and his

* The points of law contended for in the eight following appeals, and which ultimately prevailed, were held at the time to be a novelty in the entail law of the country. The First and Second Divisions of the Court differed on the points, and arrived at different decisions. The doctrines enforced and contended for, were characterised as "new fashioned," as "revolutionary," and as calculated to produce a "convulsion in the entail law." They *may* be conceived to have dealt a heavy blow to the *strictissimi juris* construction of entails, as *then understood.*

heirs male and of tailzie therein-mentioned. In that entail there was a prohibitory clause, prohibiting the heirs of tailzie "to sell, alienate, wadset, or dispone, any of the said haill "lands, lordships, baronies, offices, patronages, and others "above rehearsed, nor to grant infeftments of liferent nor "annual-rent forth of the same, nor to contract debts, nor "do any other fact or deed whatever," &c. There were proper irritant and resolutive clauses in this tailzie to cover these. There was the following permissive clause in regard to tacks: "It is always hereby expressly provided and de- "clared, that notwithstanding of the irritant and resolutive "clause above-mentioned, it shall be lawful and competent "for the heirs of tailzie above specified, and their foresaids, "after the decease of the said William, Duke of Queens- "berry, to set tacks or rentals of the said lands and estate, "during their own lifetimes, or the lifetimes of the receivers "thereof, the same being always set without evident diminu- "tion of the rental."

The late Duke of Queensberry succeeded to the estate in 1731, under the entail; and upon his death, in 1810, he was succeeded by the respondent; the appellants having been appointed his trustees and executors.

During his long possession of the entailed estate, the late Duke, the appellants stated, had always been in the practice of granting leases to his tenants, for terms of years of a considerable endurance. It will be shown, they added, that in granting these leases, he used the best, and, indeed, the only means he had of improving the lands. He had also been in the practice of taking grassums or entry money from the tenants at the commencement of the leases.

The appellants separately stated, that for a century past it had been the practice in Scotland so to let entailed lands.

Of this date, the late Duke granted a lease to Alexander Welsh, of the lands of Easter Harestanes, for fifty-seven years, from Whitsunday 1791, at a yearly rent of £74, 1s., and besides, the tenant paid a further sum of £310 of grassum or entry money. May 23, 1791.

In consequence of the proceedings and decision in the Wakefield case, Welsh brought an action of declarator against the late Duke of Queensberry, the late Earl of Wemyss, and the late Lord Elcho, as next heirs of entail, to have it found that his lease was a good lease for the whole period of endurance then to run.

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Afterwards, the respondent brought an action of declarator at his instance against the Duke and the tenants on the entailed estate, setting forth, that the late Duke had been in the practice of setting tacks for a longer term or period than his own lifetime, or the lifetime of the receivers thereof, the period to which he was restricted by the entail. And that he had let leases to the tenants following. (Here the whole tenants were enumerated, along with Alexander Welsh, tenant of Easter Harestanes.) The summons further set forth, "That it should be found and declared, that it was not "competent to, nor in the power of the said William, Duke "of Queensberry, to set or grant any tacks, or leases of any "part of the entailed lands and estate before written, to "endure for a longer term or period than his own lifetime, "or the lifetime of the tenants, receivers thereof; except in "terms of and under the provisions of the Act of the 10th "of our reign, cap. 51, for encouraging the improvement of "lands in Scotland, held under settlements of strict entail, "nor to grant any tack of the said lands and estate, in con-"sideration of fines or grassums, and thereby diminish the "rental; and that all such tacks or leases so granted, either "for a longer period than prescribed by the said entail, "(unless they are in terms of the said Act of Parlia-"ment), or upon payment of grassums by the tenants, are "void and null, and should be declared to be of no force or "effect in prejudice of the pursuer, as heir of entail afore-"said."

This action also contains conclusions for damages.

Dec 16, 1809.

Both these actions were conjoined and avizandum made to the First Division of the Court. Mutual informations were ordered and lodged; and soon thereafter William, Duke of Queensberry, died; upon which an action of transference was raised at the instance of the respondent, Lord Wemyss, and decreet transferring *in statu quo* against the appellants as trustees and executors of the late Duke.

Nov. 12 and 13, 1812.

The case having been reported, the following interlocutor was pronounced by the Court, of this date: "Upon report "of the Lord President in place of Lord Woodhouselee, "and having considered the informations for the parties, the "Lords sustain the defences in the process of declarator at the "instance of Alexander Welsh against the Earl of Wemyss "and others, substitutes under the deed of entail, and as-"soilzie the said defenders from the conclusions of the libel, "and decern; and further, remit to Lord Hermand as Lord

"Ordinary, in place of Lord Woodhouselee, to hear parties "on the conclusions of the said libel for damages, and to do "therein what he shall see just. And with respect to the "process of declarator, at the instance of the Earl of Wemyss, "against the late Duke of Queensberry and John Anderson "and others, tenants of the tailzied lands and estate of "Queensberry and others, the Lords remit the said process "to Lord Hermand, as Ordinary, in place of Lord Wood-"houselee, to hear parties on the conclusions of the same as "applicable to the cases of the several defenders, and to do "therein as he shall see just." On reclaiming petition the Court adhered. May 25, 1813.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—In granting the lease in question, and the other leases of the same nature, the late Duke of Queensberry only continued the practice of his predecessors, and the general practice of Scotland in cases of the like kind. The endurance of this lease may be considered as beneficial to the estate, in so far as it tends greatly to the improvement of the lands, which being strictly entailed, cannot be improved but by means of leases of a considerable endurance. The grassum is taken from the tenant at his entry, in conformity with the ancient custom of this and many other estates. The lease was not granted in dimunition of the rental, as the rent paid by Welsh is greater than any former rent paid for the same lands, and far exceeds the rent of these lands in the rental before-mentioned, signed by the Duke of Queensberry and Earl of Tweeddale, which was only six years prior to the tailzie.

It appears from various documents which have been preserved, that it was a long established custom in the management of this estate, and most other estates in that part of Scotland have been managed in the same way, to take grassums or entry money, when the leases were renewed. It was not usual to raise the rents, unless there was some particular reason for doing so, and the grassums taken were in proportion to the length of the leases. The accounts which were kept by Mr Montgomery of Macbiehill, chamberlain upon this estate during the minority of the late Duke, show that grassums were regularly received when leases were granted. They were also taken by the Tweeddale family when the estate was in their possession, before the year 1686; and during the whole period since the Queensberry family

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came into possession, it has been the practice to let leases for terms of years, and not during the lifetimes either of the granter or receiver.

As to the length or endurance of the leases granted by the Duke, he had the example, not merely of his own predecessors, the proprietors of this entailed estate; but also that of the landholders of Scotland generally, whether their estates were entailed or unentailed, excepting where the tailzie contained a special prohibition of leases to endure beyond a certain period of time. It has for a century past been extremely common to great leases for fifty-seven years, of which there are numberless instances in every part of the country. And it is remarkable, that such leases have been commonly granted, not only by proprietors of entailed estates, who sometimes use, for their own benefit, what they conceived to be their powers, without much regard to the interest of the succeeding heirs of entail, but by proprietors of unentailed estates, who, generally speaking, cannot be suspected of any other motive in granting these leases, but a wish to improve their estates, by giving a proper and necessary encouragement to their tenants. Where such men grant leases of this description, it is, at least, a proof of their opinion, that they cannot do anything more wise and provident in the management of their estates, for their own benefit and that of their heirs. In their opinion, it is not a waste and dilapidation of the estate, but a prudent act of administration, by which they expect that the value of it will be increased, and at the same time rendered more permanent and secure.

Long leases were formerly considered in Scotland as disadvantageous to the landlord; because, while they debarred him from the natural possession and enjoyment of his property for a long period of time, he had no reason to expect that this disadvantage would be compensated by any improvements of it, that could be made by tenants, who had little knowledge of agriculture, no capital, no enterprise, and no industry. He had every reason to fear that the tenant, at the end of a long lease, would leave the land in a worse condition than he found it; but the circumstances of the country have materially changed. During a long period, farms have been taken as the means, not of procuring a precarious subsistence for the poor labourer of the ground, the words by which a tenant is described in the Scotch Statute 1449, but of vesting and securing an extensive and active capital, under the management of a man of skill and intelligence, holding

a most respectable rank in society. Leases of a considerable length granted to such persons, have produced a degree of improvement in Scotland, which otherwise could never have existed; as it is fully ascertained by experience, that no improvements are so solid or so lasting as those which are made by the independent exertions of the tenants themselves, who have a security for receiving a return for their skill and industry, and for an enterprising outlay of capital, sunk in the undertaking in which they have engaged.

2d, At the date of the lease granted to Welsh, and long afterwards, the power of a proprietor of an entailed estate, where the entail contained no special prohibition as to the endurance of leases, to grant a lease for fifty-seven years, without diminution of the rental, and to take a grassum from the tenant at his entry, had been acknowledged by the custom of Scotland, for ages, and held by every lawyer to be unquestionable.

3d, The late Duke of Queensberry had power to grant the lease in question, and this is proved by the decided cases. (Here the case of Leslie *v.* Orme was referred to.) *Ante*, vol. ii., p. 533.

4th, The judgment of the Court of Session, if it is allowed to stand as a precedent, would produce the most ruinous consequences to very numerous classes of persons in Scotland, who, trusting to the received practice of the country, to professional opinions of the highest authority, and to the decided cases in similar questions, have relied, with implicit confidence, upon the validity of leases of a considerable endurance, granted under strict entails.

As a small specimen of the great number of leases of long endurance, which had been granted in the ordinary management of the estates, the appellants produced in the Court of Session, a list of many hundreds, collected from accidental information, in a very short time. That list is now before your Lordships, and there cannot be the smallest doubt, that there are now existing at least as many thousand leases as there are hundreds in the list, in virtue of which the tenants are actually in possession.

5th, The entail in question does not, according to its legal construction, prohibit the granting of leases for fifty-seven years. The Duke held the estate under the strict entail, which contains prohibitions that are usual in such deeds, against selling, contracting debt, or altering the course of succession, and these prohibitions are properly guarded by irritant and resolutive clauses; but, there are no words in the

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entail by which the heirs are expressly prohibited from granting tacks or leases of any description whatever.

It has always been held, that an heir in the fee of an entailed estate, has a right that is absolute and unlimited, in so far as it is not restricted by express and direct words of a known, precise, and definite meaning. But the entail in question contains no prohibition of leases in express words, though certain general words in it were said to comprehend a qualified prohibition of that sort, which ought to be so construed against the heirs of entail, as to prevent them from granting tacks or leases of a long endurance. It was not pretended that the entail forbids leases of a *short endurance*, or of any endurance that was not of an extraordinary length, but only of such length as was common and usual in the management of estates, whether entailed or unentailed, and, of consequence, it was admitted that the heirs of entail had power to grant such leases.

The clause relied on by the respondent, as amounting to a prohibition, is, where it prohibits heirs of tailzie "to sell, "alienate, wadset, or dispone any of the said haill lands, "lordships, baronies, offices," &c. And the argument of the respondent is, that this lease was granted in contravention of the prohibition to alienate. Then the point to be considered is, whether the lease was an *alienation*, and as such, a contravention of the tailzie, and voidable at the instance of the respondent, in virtue of the prohibitory, irritant, and resolutive clauses in that deed.

Now, in common language, no person would say that the Duke had alienated this property by granting the lease; nor can it be pretended that, even in the language of the law, that has been used for much more than a century, such a lease has been termed an alienation with reference to any question whatever. Much less has it been termed an alienation with reference to the prohibitory clause against sale, disposition, or alienation, in an entail.

6th, If the lease granted to Welsh is not voidable under the entail, on account of its length, it cannot be objected to, either on account of the smallness of the rent, or on account of the grassum. In effect, these two objections may almost be considered as one and the same; for, as it has not been alleged that the late Duke of Queensberry made a bad bargain for himself, it must be understood, that if the grassum had not been stipulated, the rent would or might have been a little higher than it was; and if the rent had been higher,

no grassum would have been received. But, though there is in substance but one objection, it may be considered under its double aspect, and when so considered, the appellants contend, 1st, That the rent was not too low, but a fair rent as far as could be got; and, 2d, That the taking of the grassum was not illegal, and that there was no clause in the entail prohibiting the taking of grassums.

[In an additional appeal lodged for the appellants, to supply what had only been slightly pleaded in the preceding argument, namely, the effect of the Act of Parliament, 1449, in favour of the tenant, and the fact of a grassum having been paid, the following was further submitted.]

1st, The appellant, Welsh, in his action, sought to have his possession secured by a declaration, that the lease granted in his favour, by the late Duke of Queensberry, for a term of fifty-seven years, was a valid and sufficient title in his, the appellant's, person, for the whole of that term, and to induce that conclusion, he pleaded that the Duke was not prohibited by the entail under which he held the estate, whereof the appellant's farm is a part, from granting such a lease, and that the possession under it was protected against challenge by the Act of Parliament 1449, c. 17, entitled "The "buyer of land should keep the tacks set before the buy-"ing."

The length of the lease cannot be considered an alienation; and the lessee is protected against all the world by force of the statute. The statute does not protect alienations under the colour of a lease; but, the appellant maintains with confidence, that there is no difference between a lease granted by one who holds in fee simple, challenged by a singular successor, as not within the statute, and one granted by an heir of entail, not specially restrained in the exercise of the power of leasing, when challenged by the next heir, which the heir can only do in the character of singular successor, or not representing the lessor. The question in the present case is, therefore, of the utmost importance, as affecting every lease for such a term in Scotland, and shaking the security afforded to tenants by that most salutary statute.

The appellants are confident, they may assume that the permission in the entail of the March estate to grant liferent leases, is not to be construed as a *prohibition* to grant leases for a term of years; that the entail is to be taken as if there were not a word in it respecting leases; and that the power

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of the heir in possession to grant leases is unlimited, unless they are such, as by the construction of law, amount to an alienation of the estate, or are struck at by the prohibition to alienate, which the entail contains.

The appellants hold it to be settled law, that one holding under an entail may exercise every lawful act of ownership not prohibited by that entail. This is not only consonant to principle, but is clearly deducible from the terms of the Act 1685, from whence entails derive their authority. That act makes it lawful for his Majesty's subjects to tailzie their estates, and to substitute heirs in their tailzies, *with such conditions and provisions as they shall think fit;* and, therefore, wherever a condition or restraint is not imposed, the fair, as well as the legal inference is, that the entailer intended to leave the heir at liberty in the particular omitted. It has been argued that, as the Act allows tailzies to be affected by irritant and resolutive clauses, *whereby* it shall not be lawful for the heirs to sell, annailzie, or dispone the estates, unless the granting of long leases, for inadequate rent, came under the one or other of those terms, the object of the law might be defeated, and that, in fact, no authority was given to prohibit leases of any sort; but, this argument can have no weight, when the preceding sentence of the statute is attended to, which allows every condition and provision the entailer thinks fit to be inserted.

The words in the Act which protect the tenants are: "It is "ordained, for the safety and favour of the poor people that "labour the ground, that they and all others that have taken, "or shall take lands in time to come, from lords, *and have* "*terms and years thereof*, that, suppose the lords sell or an- "nailzie the lands, the takers shall remain with the tacks "until the issue of their terms, whose hands soever the lands "come to, for sic like maill (*i. e.* the same rent) they took "them for." It will not be contended that an heir of entail is in any better situation than a purchaser, as the only ground on which such heir can challenge the acts of his predecessors is, that he takes as a singular successor, *per formam doni*. The appellant, Welsh, therefore pleads the statute 1449, in bar of the respondent's declaratory action.

2d, The second objection stated is, that there was a grassum paid. It will not be disputed that the taking of a grassum has been customary, and has been recognised as something distinct from rent, from earliest times. Craig says, "Gras- "sumas dicimus summas pecuniæ quæ in principio *assedationis*,

"aut solventur aut permittuntur supra *annuum mercedem.*" The common law has not held that taking grassum is equivalent to the assignment or sale of rent, or to the tenants retaining part of the rent in security for money advanced to the landlord, or substantially the same as a loan. It is not held as an anticipation of the rent, having none of the qualities of rent; for neither sterility nor irritancy *ob non solutum canonem*, nor any other course which determines the lease during its currency, affects the grassum, nor can it be recovered by hypothec or sequestration, nor does it create any of those preferences competent to the landlord for recovery of rent.

Pleaded for the Respondent.—1st, The endurance of the lease. On this point, it is to be considered, first, that leases are "real rights," constituted by transferring from the lessor to the lessee, nearly the whole right of property for the term of such leases. The right of property is nearly all included under the description of a right of exclusive using and taking of the fruits of any subject. Now, a lease transfers all this out of the lessor into the lessee, during the time of its continuance. Leases in Scotch law were, anciently, not real rights, but effectual only against the granter and his heirs. But, by the statute 1449, cap. 17, it was provided "for the "safety and favour of the poor people that labours the ground, "that they and all others that has taken, or shall take lands "in time to come, from lords, and has terms and years "thereof, that suppose the lords sell or annailzie that land "or lands, the takers shall remain with their tacks unto the "issue of their terms, into whose hands soever the lands "come, for 'sike like maill' (*i. e.* same rent) as they took "them for." This rendered a lease with possession valid, against any future acquirer of a right of property in the land.

Such being the nature of leases, it appears that they must fall under a prohibition of alienation of any subject, because all grants of any part of the right of property must fall under a prohibition. In such a prohibition, the word has always been used to express any conveyance of any part of the corporeal subject, or of the *right thereto.* On other occasions, *alineate*, or *alienation*, may be used to designate nothing less than the fullest transmission of the whole subject or right. Thus, in a sale of a subject, or obligation to sell it, if the party "alienates," or agrees to "alienate," it is understood he transfers, or agrees to transfer, all right that is in him. For there his obvious intention is to designate nothing less than the fullest and most entire transmission. But, in a prohi-

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bition of alienation, the obvious meaning is to designate every thing, more or less, which is at all of the nature of alienation, whether it relates to the whole or a part of the corporeal subject, or of the right.

According to the civil law, it appears that a prohibition of alienation applied to all transmissions of any part of the real right. Thus, in the title of the code *De Rebus* alienis non alienandis, &c., there is preserved the following rescript of Justinian: "Sancimus sive lex alienationem inhibuerit, sive "testator hoc fecerit, non solum dominii alienationem vel "mancipiorum manumissionem esse prohibendam, sed etiam "usufructus dationem, vel hypothecam, vel piquoris nexum "penitus prohiberi. Similique modo, et servitutes minime "imponi, nec emphyteuseos contractum nisi in his tantum- "modo casibus, in quibus testatoris voluntas qui alienationem "interdixit, aliquid tale fieri permiserit."

There can be no doubt that prohibitions of alienation have, in Scotland, always, and universally, been regarded as sufficient to prohibit the transmission of the right of property, in whole or in part, by granting real rights out of it. Thus, to pass over entails at present, alienation of land is prohibited in Scotland by persons on death-bed, where the land is annexed to the Crown, where it is held by church beneficiaries (under certain provisions), where it belongs to persons who are *obœrati*, or to persons inhibited or interdicted. In none of these cases is there any evidence that it ever was held competent to grant any real right out of the property, materially diminishing it.

Such being the case, why should not such prohibitions apply to leases, as well as to other real rights? Leases are real, and they convey out of the granter for a time, which may be very long, almost the whole right of property. Of all real rights, not absolutely transmitting the entire property, none seem more clearly to fall under such prohibition.

There is, however, a very material peculiarity, which, from the earliest periods of the Scotch law, has been applicable to leases, and which is not applicable to most other real rights. This is, that leases, to a certain extent, are necessary for the advantageous management of landed property. The proprietor of a landed estate cannot, in general, cultivate it himself. For this reason, he is under the necessity of leasing to other persons for rent. It became the practice, therefore, to lease for a period of more than one year, as fairest for the tenant, and also for the landlord. That this was the ordinary

practice at the date of the statute 1449, appears with certainty from the terms of that statute. This being the case, however, if prohibitions to alienate had been so enforced as to prevent all leases, they would have injured the proprietor, without benefiting any person. Nay, they would have injured the person in whose favour the prohibition was made. An equitable limitation of the effect of such prohibitions appears always to have been admitted in favour of such leases as were necessary for ordinary management or administration. That this principle was well known in Scotch law, is proved by a clear and strong instance, that of such leases let on lands which afterwards fell to the Crown by forfeiture. The nature of this instance will appear from a passage in the institutions of Lord Stair. Lord Stair says, "Forfeiture confiscateth the forfeited person's whole estate, "without any access to his creditors; yea, without conside- "ration of dispositions, infeftments, *or other real rights* granted "by the forfeited person, since or before the committing of "the crime of treason, for which he was forfeited, which fall "and become null by exception."

Stair, B. iii., tit. iii., § 30.

In the management of the temporal property of the church, the same principles prevailed, as also in that of royal demesnes, and of the property of the burghs and other lay corporations.

In regard to the Entail Act 1685, it has been generally held, looking to its whole contents, that, however effectually an entailer may bind his heirs by all sorts of prohibitions and injunctions, yet that, with respect to third parties, the power of rendering deeds null and invalid, must be limited by the terms of the statute. But the statute is silent as to any direct mention of leases, and yet it has been invariably held, that prohibitions on that subject are effectual under the statute against third parties; and it must have been so held upon the general ground, that a prohibition to alienate comprehends, as one of its varieties, a prohibition to grant leases beyond those of ordinary administration. Had not the word *alienation* been understood at the time as sufficient for the purpose, it cannot be imagined, that in framing this important statute, the legislature would have overlooked one of the common and obvious modes of dilapidation, by which the residuary interest of posterior heirs may be so deeply injured.

But, it is objected, that prohibitions of alienation in entails differ from all other prohibitions of that kind; that entails are odious, and, therefore, to be strictly construed, whereby it is said that the narrowest meaning of the word alienation

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is to be taken, in which it is limited to conveyances of the property or right integrally. In answer to this, it is submitted, that even strict construction could never so operate upon a known style of prohibition when transferred into an entail, as to change its nature and render it nugatory. It is impossible, therefore, that by any construction, this established style could be deprived of its fixed meaning and effect in law.

But the truth is, there has been great exaggeration of the odiousness of entails, and the strictness of interpretation bestowed on them in Scotch law. On this point, it appears to have been argued, that in regard to entails, though statutory, the grand rule of interpretation *ut res magis valeat quam pereat*, is to be reversed; and that Courts are to adopt any construction, the rather because it makes the deed imperfect or nugatory; and that fraud against entails is fair and legal, if only it be "cleverly done," or rather be not so grossly bungled as not to be a fraud at all. But, it appears a paradox to say, that such maxims can possibly be applicable to deeds expressly authorized, *in terminis*, by the legislature, and a very few remarks will be sufficient to show how little ground there is for imputing such an absurdity to the law of Scotland.

There can, therefore, no longer be any doubt in general, that under the prohibition of an entail (and of the Neidpath entail) against *alienation* leases are included, with the exception only of such leases as are not beyond the bounds of "ordinaria et necessaria administratio." And the only question remaining on this point in the present case is, whether a lease for fifty-seven years, be in a different situation from one for ninety-seven years, and whether it falls within the exception of ordinary and necessary administrative leases? The respondent contends that the lease must fall under the same category as the ninety-seven years, and, therefore, does not fall within the ordinary and necessary administration of the entailed estate. Mr Erskine does not venture to extend the leases, which he lays it down as competent for an heir of entail to grant beyond nineteen years, or the life of the tacksman. In the case of Bogle, the lease reduced *ex capite lecti* was a lease for thirty-eight years.

B. 3, ch. 8, § 129.

2d, But, besides, the lease in question is prohibited because it was granted for a grassum. There are various grounds on which this proposition may be rested.

Grassum.

There is one view which appears to supersede the necessity

of examining whether a lease with a grassum be strictly and technically an alienation or not. In order to understand this, it is only necessary to observe, that whatever dispute there may be as to the powers, or the limitations of the powers, in other particulars, of an heir possessing, under a complete Scotch entail, at least this is perfectly clear, that such heir is liable to this general and comprehensive limitation, that his interest in, and his power over the estate, are bounded by the period of his life, and that he has neither right nor power to dispose of any fruits or profits that may arise after his death, or to put into his own pocket the price of that possession which he must then leave to his successors. In law, and in common sense, this proposition is equally clear and indisputable upon the bare statement of the case, and without reference to any of the particular prohibitions or words of the entail. The heir in possession is, no doubt, proprietor of the estate while he is in possession; but he is not proprietor of the crop that is to grow fifty or five years after his death, and has no right to dispose of that crop or any part of it. He may commit waste, it may be, in his own time, and take such uses of the property while it is in his own possession, as he thinks fit, without regard to the interest of succeeding heirs. But the waste must be committed in his own lifetime, and the uses confined to the period of his actual possession. He may cut down wood, it is contended, however unfit for cutting, or however essential to the shelter or ornament of the lands; but he cannot sell wood to be cut down after his death. He cannot pocket the price of the wood which he finds on the estate, or transmit it to his executors, and at the same time reserve to himself the enjoyment of its protection and beauty during his own time, and then let in the purchasers to sell every tree before the face of the succeeding heir. In the same way, he may let the lands for his own life, on the most ruinous principles, and with the most pernicious powers and privileges to the tenant; powers to cut wood, for instance, or to exhaust minerals, and may, consequently, draw a greater rent than could have been otherwise obtained; but he cannot give such powers for a period beyond his own life; and far less can he stipulate for an extraordinary rent in consideration of granting them, and at same time provide that their exercise shall be suspended during his possession, and only be indulged to the prejudice of his successor. Finally, and to come near to the case in hand, he cannot, even in an ordinary lease,

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stipulate for a high rent during his own life, and a low one thereafter.

Now, if an heir of entail, being eighty years of age, lets a farm for fifty-seven years for a grassum, can it be disputed, that he disposes of the fruits and profits of the estate for fifty years after his own death? Does he not substantially sell and pocket the price of part of every crop that is to grow for that period, and enrich himself and his executors at the expense of the next succeeding heir? Most assuredly he does.

In the next place, however, it is submitted, that a lease for a grassum is directly and technically within the prohibition against alienation. This proposition is established by the same arguments and authorities which apply to long leases. It was shown that leases were, in their own nature, conveyances of part of the right of property, viz., the real right of using and taking the fruits of the subject for a time, and, therefore, they fell under prohibitions to alienate, with the exception of such as were necessary for due management. That, accordingly, leases of a length exceeding that necessary for beneficial management, as well as leases of mansion-houses, are void where alienation is prohibited. In like manner, leases which, on account of the consideration received for them, are foreign to ordinary good management, must, for that reason, be prohibited, under a prohibition of alienations. A lease for a grassum is just a lease, partly for annual-rent, but partly without annual-rent, for a price paid down to the granter. It is much more manifest that a lease of this sort is out of the bounds of necessary or ordinary management, than that a long lease, or a lease of a mansion house is so.

But, it has been said, there has been a practice of taking grassums under prohibitions to alienate or dispone. But, when this alleged practice is examined closely into, it will be seen that the cases quoted in the list refer to cases of proprietors taking grassums, who held their lands in fee-simple, not under any restriction at all. But, in regard to entails, it is certainly important that no instance of this practice is adduced until towards the middle of last century, near 100 years after the first introduction of strict entails; and the origin of that practice had likely arisen from confounding fee-simple estate and entailed estate.

No doubt, there is a possessive clause to grant leases to a certain extent, in this entail. This part of the question falls to be considered under two distinct heads. In the *first* place,

when taken by itself in its plain and incontrovertible meaning, it may be held to import a limitation of the power of granting leases for longer terms of endurance than those of the lives either of the granter or of the tenant. In this the respondent has no occasion to resort to any tacit implication, by which one species of prohibition is to be extended to another of a different species. He would require no more than a fair interpretation of the clause. Of course, the permissive clause bears an express reference to the preceding prohibitions, irritant and resolutive clauses, and sets forth, in language not to be misunderstood, that by the unrestrained operation of these prohibitions, it would not be in the power of an heir of entail to let leases for the lifetime of the receiver thereof; and the sole object of the permissive clause, is, for the avowed purpose of modifying the previous clauses, that this provision and declaration on the subject of leases has been introduced. After all that has been now said on the subject of long leases, as importing a species of alienation, it surely cannot admit of a moment's doubt, that the prohibition more immediately referred to, in this permissive clause, is the prohibition against alienation; the effect of the clause is, therefore, to demonstrate that under the term *alienation*, the entailer intended to include all those acts which technical usage authorised him to consider as the species of that genus; and that, in particular he held it to be a prohibition of all leases. The general prohibition, taken in connection with the permissive clause, is just a prohibition of all alienations, with exception of leases of a certain endurance, and other qualities. Under such a prohibition, it is obvious that, unless the word alienation be utterly incapable of including leases, they must be included, because the context demonstrates that the entailer intended to include them, and used the word with that meaning.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed. Journals of the House of Lords.

For the Appellants, *Sir Saml. Romilly, Mat. Ross, Henry Brougham, John Clerk, Fra. Horner.*

For the Respondent, *John Leach, F. Jeffrey, J. H. Mackenzie.*

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MONTGOMERY, &c. v. THE EARL OF WEMYSS.

[Alternative Leases—Edstoun.]

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS and Others, Trustees and Executors of the late William, Duke of Queensberry, . . } *Appellants;*

The Right Hon. FRANCIS CHARTERIS, Earl of Wemyss and March, . . . *Respondent.*

House of Lords, 12th, July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—GRASSUMS—INDEFINITE TERM.—In the Neidpath entail, there was no express prohibition against granting leases or taking grassums, but there was a prohibition to "alienate" the estate or any portion of the lands. A lease was granted for fifty-seven years, at a rent of £155, with a grassum paid of £300. Some time thereafter this lease was renounced for another lease for thirty-one years, or for 29, 27, 25, 23, 21, or 19, for whichever of these periods, the Duke might be found to have power to grant it. The Court would have sustained the lease for twenty-one years, but held that as a grassum had been paid for the lease renounced, the new lease must be viewed as a substitute for the former lease, and subject to the objections pleadable against it, and that the conversion of any part of the rent into a sum instantly paid, was an alienation *pro tanto*, and struck at by the prohibition against alienation. In the House of Lords held that tacks granted partly for rent reserved, and partly for rent paid down, were not to be considered as leases let without evident diminution of the rental.

Under the circumstances set forth in the previous appeal, the late Duke of Queensberry let leases of lands for alternative periods of duration.

In 1807, Robert Symington renounced his lease of the farm of Edstoun, and obtained a new one "for the space of "thirty-one years, from and after the term of Whitsunday "1807, which is hereby declared to have been the term of the "said Robert Symington's entry, notwithstanding the date "hereof; declaring always, as it is hereby expressly declared, "that in case it shall be found that the said William, Duke "of Queensberry, is prevented by the entail of his Grace's "estate of March, from granting a lease of the foresaid "subjects for the above-mentioned period of thirty-one years, "then, and in that case, this lease is granted for, and shall "subsist and be understood to have been granted for the

"term of twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years from the said term of 1807, whichever of the said several terms of Whitsunday 1807 (short of the aforesaid period of thirty-one years), the Court of Session or House of Lords shall find to be the longest period of those above specified, for which the said Duke has power to grant a valid lease of the foresaid subjects.

When he obtained this lease, he had a lease of the same farm for fifty-seven years from Whitsunday 1792. The rent stipulated on that occasion, was £155, 7s., and the grassum paid was £300. This lease had, therefore, a great many years to run, when it was renounced for the new lease, and the rent under the new lease was the same as under the previous; but no grassum was paid. There was also a separate contract, by which the Duke agreed, if the Wakefield case was reversed, to continue the tenant on the original footing.

The respondent brought an action of reduction to reduce those leases, and, in particular, the lease of Edstoun, which is the subject of the present appeal. This action came before the Lord Ordinary, Hermand, and his Lordship pronounced this interlocutor:—"Having advised the condescendence and answers in the process of declarator, and also the condescendence and answers in the process of reduction at the instance of the Earl of Wemyss and March, against Robert Symington, and whole processes, conjoins this process with the declaratory action between the parties, depending before the Lord Ordinary, in so far as the declarator is applicable to the present case: Finds it stated in the condescendence, and not denied in the answers, that the whole farms, whereof the leases are now under reduction, were formerly let by the late Duke of Queensberry for fifty-seven years, and with an exception stated by the defenders, of the lands of Flemington and Crook, under burden of grassums, the interests of which bore a considerable proportion to the yearly rent: Finds it admitted in the answers, 'That in 'or about the year 1807, many of the tenants holding 'leases for fifty-seven years, renounced their leases and 'took new ones for periods equal to the terms unexpired 'of the old ones, but without paying any grassums for 'their new leases; and that soon afterwards, the tenants 'of all the farms as to which the present discussion relates, 'whether they had got new leases of the nature above

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" ' mentioned, or had continued to possess on their fifty-seven " ' years' leases, executed renunciations, and accepted of " ' existing leases, for which they paid no grassums;' as also, " ' That when the tenants renounced their former leases, and " ' took the present ones, contracts were entered into betwixt " ' them and the Duke's commissioner, Mr Tait, as stated in " ' the condescendence:' Finds, that although it be stated " by the respondent, that, depending on a contingency not " explained, but said not to have existed, these contracts " never were acted upon, yet they afforded evidence to show " that the new leases were, with the exception of the term " of endurance, a *surrogatum* or substitute for those which " had been renounced: Finds that the rents payable under " the renounced leases, must of necessity have been, from " the inconvenience and loss arising to the tenants from the " advance of money, a consideration of the doubts of the " powers of the lessor, held out in the contracts, and other " circumstances, have suffered a greater reduction than the " amount of the interest of the sums paid in name of gras- " sums: Finds, that besides the prohibition of alienation, " which in this Court and in the House of Lords, has been " found, in questions upon the entail now under consideration, " to strike at leases exceeding the usual term of endurance, " that entail contains a clause, which, though placed in con- " nection with a permission to the heirs of entail to grant " leases for their own lifetimes, or the lifetimes of the re- " ceivers, is to be held as a limitation on their power, 'the " ' same being always set without evident diminution of " ' rental:' Finds that the rent payable under the renounced " leases, diminished, as it was, by the payment of grassums, " cannot be considered as constituting a fair rental, such as " is implied in the above clause: Finds, that upon these prin- " ciples, there is no material difference between the lease of " ninety-seven years, and lease of any shorter period: Finds it " unnecessary to give any determination upon the effect of " the clause reducing the endurance of the lease from thirty- " one years progressively to nineteen years, or to the longest " period which the Court of Session or House of Lords may " find to be within the powers of the granter: Finds that the " lease under reduction was granted with evident diminution " of the rental; repels the defences in the declarator, sus- " tains the reasons of reduction, repels the defences therein, " and reduces, decerns, and declares accordingly."

Against this interlocutor a petition was given in for the

appellant, Robert Symington, the tenant, and also for the executors of the Duke of Queensberry, who had hitherto taken the sole charge of the defence. The Court ordered a hearing in presence; and thereafter their Lordships, with great difference of opinion, pronounced the following interlocutor: "The Lords having advised the said reclaiming Feb. 3, 1815. "petition, and having heard the counsel for the parties "at great length, in their own presence, on the whole pleas "and points in the cause, they find, that a tack of the "lands and farms of Edstoun was granted to the petitioner, "to commence at Whitsunday 1792 for the period of fifty-"seven years at the rent of £155, 7s., for a fine or gras-"sum of £300: Find it admitted in the petition, that "doubts having been entertained of the validity of the above "lease, the petitioner, along with most of the other tenants "on the estate, renounced the said tack, from and after "Whitsunday 1807, and obtained a new tack at the same "rent, for thirty-one years, or for several alternative periods "down to nineteen years, according as the Duke should be "found to have powers to grant tacks under the entail: "Find, that this current tack must be held to be merely a "substitute for the former tack, and subject to any objec-"tions on the ground of grassum or otherwise, which were "competent against the tack renounced: Find, that the con-"version of any part of the rent, which at the time might "have been obtained for the farm, into a price instantly "paid, was to the manifest prejudice of the succeeding heir "of entail, and operated as an alienation *pro tanto* of the "uses and profits of the estate; and, therefore, find that the "said tack is struck at by the clause in the entail, prohibit-"ing alienations: Find, that in estimating what was the rent "paid under the former lease, the value of the grassum paid at "the commencement of the former lease ought to have been "added, and that this not having been done, the rent pay-"able under the new lease was in evident diminution of the "rental: Find, that the whole circumstances under which "the tack was granted, taken in connection with the rela-"tive contract entered into between the Duke of Queens-"berry and the petitioner and other tenants, again to pro-"long the tack to fifty-seven years, or even ninty-seven "years, if found competent, together with the fact, that all "the tenants renounced their tacks under similar circum-"stances and conditions nearly at the same time, do indicate "a fixed plan on the part of the Duke to defeat and defraud

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" the entail, so far as possible, and that the petitioner, and " the other tenants did lend themselves to, and co-operate " with the Duke in the said fraudulent scheme: Find, that " the tack in question, and others now before the Court, " were not entered into in the fair, rational, and husband-like " administration of the estate, but for the purpose of fore- " stalling the rents and profits thereof, which would other- " wise have belonged to succeeding heirs of entail, and " thereby enriching the Duke at their expense, by enabling " him to draw from the estate more than the value of his " own liferent interest in the fruits of it: Find, that the per- " missive clause in the entail to grant tacks for the lifetime " of the granter or receiver, does not bar the heir in possession " from granting tacks for any definite period, which does not " amount to alienation, and that the tack in question might " therefore have been restricted to the period of nineteen " years, being the period then, and now, most usual in the " practice of the country, and analogous to the period fixed " by the statute of the 10th of Geo. III., where no improve- " ments are stipulated: but, in respect that the tack is other- " wise objectionable on the grounds above specified, and that " the tenants on that account, have no claim in equity in " support of their tacks, find, that the said tack cannot be " restricted to any shorter period than that for which it was " originally granted: Therefore, in the process of declarator, " repel the defences, sustains the reasons of reduction, and " reduce, decern, and declare accordingly."

On reclaiming petition, the Court further pronounced this

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interlocutor: " Find, that the tack in question, if it had not " been objectionable on the several grounds specified in their " former interlocutor reclaimed against, might have been " sustained as valid and effectual for the restricted endurance " of twenty-one years, as the period then and now most " usual in the practice of the country; and under this varia- " tion, adhered to their said former interlocutor, and refuse " the desire of the said several petitions; and having also " advised the counter petition of the Earl of Wemyss, they " refuse the prayer of the same."

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, The lease of Edstoun not being granted in contravention of the prohibitions contained in the Neidpath entail is not exposed to challenge on account of the grassum taken by the Duke of Queensberry.

2d, The lease was granted for a definite term, namely, for the longest of six specific periods, to which the Court of Session, or this Honourable House, should find the Duke of Queensberry's power to lease extended.

3d, The lease ought to be sustained for thirty-one years, being a period far within the power of his Grace the Duke.

Pleaded for the Respondent.—1st, The alleged lease of Edstoun is, in its own nature, an incomplete agreement, and ineffectual in law, from the want of any definite stipulation in respect to its endurance.

In this case, the contract entered into between the parties was for a lease of no definite period of endurance, but which, in a certain event, might be reduced as low as nineteen years, and in another raised as high as ninety-seven, and which might be found good for any number of the numerous years between these periods. For, in this branch of this discussion, the respondent is entitled to look to the contract at the time it was entered into; he is not bound to look merely to the present state of matters, abstracting from the contract accompanying the lease which is now nugatory, though even if that be done, the agreement of lease appears to be for thirty-one years, or a less number down to nineteen, or for such other number as it should appear by a decision of a Court of law, that it was within the power of the Duke to give.

Such being its nature, it does not appear that it was binding in law, even as a completed contract. It wanted one of the essentials even of an agreement to grant a lease. For even an agreement of that sort must be void in law, unless the term of endurance of the lease be fixed by the parties in some complete way. Here, it is said, that the termination of the lease is to be fixed by the Court of Session, subject to the review of the House of Lords. That that Court is to be arbiter between the parties, and to say how long they are bound to each other. There seems to be very great doubt whether the Court could accept of such a submission; whether it would be decent and becoming for it to become arbiter for completing transactions which the parties ought to have completed themselves. It is the duty of courts of law to enforce the fulfilment of contracts; but it is not their duty to make contracts, if the parties have not made them. Where parties have contracted, a court of law will explain what is ambiguous, and enforce fulfilment of what is clear, but it will not supply any essential, which is defective, from the parties themselves not coming under an engagement upon that par-

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ticular point. If an agreement to sell an estate were entered into, but no price was fixed, would a court of law compel implement, and fix the price at which the seller must denude and give possession? Nay, if the minute of sale distinctly referred the price to the Court of Session, could the Court accept of this reference, enter into an examination of the lands, and so fix the price? Would it be right to occupy the time of the court of justice, instituted for the purpose of enforcing rights and redressing wrongs, in determining matters of that kind, which it was incumbent on the parties to settle for themselves? Surely not. They will not interfere either to make a contract for the parties or to fill up a blank left unsettled or undetermined by a contract made by them. For such a proposition as the appellant contends for, the respondent has looked in vain for any decision or authority.

2d, But supposing the lease of Edstoun to have been in itself otherwise complete as a real right, it was let for a grassum. *Vide* the argument on this point in Harestane's case.

3d, The lease of Edstoun was, in respect of endurance, not a lease under the power of letting leases on the entail of Neidpath. The power is limited to leases for the lifetime of the granter or receiver; and there is no provision in the lease of Edstoun, by which it could, in any event, or may, be reduced to a lease of that kind. It, therefore, is clearly not in terms of the power. But it has been shown in the Harestanes case, that the general prohibition of alienation in its own nature, and still more, when taken, as it must be, in connection with the permissive clause, must be interpreted to extend to all leases whatever, and to exclude all leases not excepted by the permissive clause.

Journals of the House of Lords.

After hearing counsel upon this appeal, complaining of two interlocutors of the Lord Ordinary, of 14th June and 19th July 1814, and two interlocutors of the Court, and signed the 21st February 1815, and 17th and 29th November 1815. As also upon the answer of Francis Charteris, Earl of Wemyss and March, put into the said appeal: And consideration being had of what was offered on either side in this cause. The Lords Spiritual and Temporal in Parliament assembled, Find, that the said Duke of Queensberry had not power under the entail founded upon between the parties in this cause, to let tacks partly for rents reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renun-

ciation of former tacks which were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered in questions between the parties claiming under the entail, as let without evident diminution of the rental: and it is ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

For the Appellants, *John Leach, F. Jeffrey, J. H. Mackenzie.*

For the Respondent, *Sir Saml. Romilly, Geo. Cranstoun, H. Brougham.*

[Edstoun.]

ROBERT SYMINGTON, Tenant in Edstoun, . *Appellant;*

THE EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—GRASSUMS—ISH.—In the Neidpath entail there was no express prohibition against granting leases, or taking grassums, but there was a prohibition to alienate the lands, or any portion thereof. A lease was granted for fifty-seven years, at a rent of £155, 7s., and a grassum paid of £300. This lease, before its expiry, was renounced for a new lease, at the same rent, for the term of 31 years, or 29, 27, 25, 23, 21, or 19 years, whichever it might be held the Duke had power to grant. In a declarator, at the instance of the tenant, held that the last mentioned tack must be held as a substitute for the 57 years lease, and subject to the objections pleadable against it, and, therefore, that the conversion of any part of the rent into a sum instantly paid, was to the injury of the substitute heirs of entail, and an alienation *pro tanto*, and struck at by the prohibitory clause to alienate. In the House of Lords, held that a tack granted for rent partly reserved and partly paid to the Duke, fell under the prohibition to alienate, and was in diminution of the rental.

In 1731, when the late Duke succeeded to his entailed estates of Neidpath and March, as detailed in the preceding appeals, the farm of Edstoun was let for a rent of £83, 10s. In 1756, it was let for £85, 12s. In 1769, it was let for 19 years, at the rent of £149; and a grassum was then paid of £193, 7s. 4d.

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The last lease expired in 1788; and in 1792 a lease was granted to the appellant, for fifty-seven years, at an increased rent of £155, 7s., and for a grassum of £300. On this lease the appellant obtained possession, and continued to possess, without any change of circumstances, or any doubt concerning his right, for fifteen years. Thus, he held a real right, perfect in its nature while it subsisted, and undoubtedly acquired, on his part, in the clearest *bona fides*.

In the year 1807, some discussions took place in the Court of Session, in an action which had been brought by the Duke of Queensberry against the Earl of Wemyss, the next heir of entail, for having it declared, that a lease which the Duke had granted to Alex. Welsh, for ninety-seven years, was ineffectual. Before that time it had been the general, if not the universal opinion, that, where an heir of entail was not expressly prohibited to grant leases of extraordinary endurance, he had power to do so; and in the case of Leslie *v.* Orme, a lease for *four nineteen years*, granted by an heir of entail, had been expressly sustained. But in that action, the Court of Session sustained the defences of the Earl of Wemyss, thereby finding that he had no power to grant a lease for ninety-seven years.

In these circumstances, the Duke, upon the appellant's renouncing his fifty-seven years' lease, granted a new one for thirty-one years, from and after Whitsunday 1807, or, if he had no power to grant such a lease, then for 29, 27, 25, 21, or 19, from the term of Whitsunday 1807. The rent was the same as paid under the former lease; but no grassum was paid on this new lease.

The declarator of Lord Wemyss against the Duke of Queensberry, and all his tenants, being remitted to Lord Hermand, the pursuer now proceeded farther in that process, and in his reductions; and, in particular, he insisted for reduction of the appellant's lease, and of the lease which had been granted to Wm. Murray for his lifetime, at the standing rent, and for a grassum. Lord Hermand pronounced an interlocutor, which is quoted in the preceding appeal; and, on reclaiming petitions, the Court pronounced the two several interlocutors in the preceding appeal.

Vide Appeal. June 14, 1814. Feb. 3, 1815. Nov. 1815.

Against these interlocutors the appellant brought this separate appeal to the House of Lords.

Pleaded for the Appellant.—1st, The appellant obtained his lease, as a third party, *bonâ fide* contracting with the late Duke of Queensberry, the proprietor in the fee. By this

lease and possession, he holds a real right, in terms of the statute 1449, c. 17; and the merits of his right, so established, are not affected by any considerations that are personal to the Duke of Queensberry or his representatives, or by the nature or effect of any other leases which he may have granted to other persons.

The general principle of law, that a tenant contracting for a lease, with the proprietor in the fee, for onerous causes, and obtaining possession upon that lease, has a real right, by express statute, good against all singular successors; that he is in an entirely different situation from the granter of the lease and his representatives; and that the principles applicable to any question concerning the validity of the tenant's right, are entirely different from those which regulate questions regarding the obligations of the granter of a lease, or his representatives, has been fully explained, in an appeal case for Wm. Murray, to which the present appellant begs leave to refer. And, it is there, at the same time, shown that the respondent, throughout his argument, has entirely lost sight of this distinction, and has argued the case on principles and assumptions which have, truly, no application to the case in issue. At the time the fifty-seven years' lease was gone into, the belief was prevalent that long leases were permissible. There could, therefore, be no fraud; and the *bona fides* of the contract could admit of no question. In so far, therefore, as the case depends on the lease granted in 1792, there is no pretence for stating that it was not as fair a transaction on the part of the tenant as ever took place, or for denying him the character of a *bona fide* purchaser. On the faith of this lease so obtained, he was fifteen years in peaceable possession before any serious doubt arose concerning the validity of his lease. He employed his capital, and bestowed his labour, in the reasonable belief that it was unchallengeable.

2d, The late Duke of Queensberry was the absolute proprietor of his estate, in every particular in which he was not laid under restrictions by the express words of the entail. And it is a rule of law, that the limitations of an entail, more especially in all questions with third parties, are *strictissimi juris*, and that no such limitations can be raised up by implication.

3d, The entail under which the Duke of Queensberry possessed the estate of Neidpath, contains no prohibitions against taking grassums in the leases to be granted. And, where an entail does not prohibit grassums in express words, it has

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always been held as clear law, that the heir of entail is not restrained from taking them.

4th, The lease, besides, is not liable to reduction as an alienation, in respect of its endurance. When your Lordship shall have disposed of the question of grassum, the only question which remains concerning the appellant's lease is, Whether the heir of entail is entitled to set it aside, in respect of the period for which it is granted? And it is of importance to observe, that more particularly the question which ought to have been decided under this ground of reduction, is, Whether it is absolutely void and null in all points, or to all effects, and cannot subsist even for nineteen or twenty-one years? The question, then, is, Whether the lease granted to the appellant for thirty-one years, or, at least, and alternatively for 29, 27, 25, 23, 21, or 19 years, or for whichever of these periods the granter had power, or was not prohibited, to make the lease, is an *alienation* of the property, and so expressly prohibited by the prohibitory clause in this entail? It must be conceded, that a lease for nineteen years is not prohibited by the prohibition to alienate. It is not worth while here to take notice of the untenable argument by which the pursuer has attempted to prove that every lease is an alienation. As an argument, in a question of law, this is no better than a play upon words. The undeniable truth is, that the heir of entail cannot challenge every lease, on the allegation that it is an alienation. Confessedly, he cannot challenge a lease for nineteen years, on the statement that it is an alienation, in respect of its endurance. Why not, then, is a lease good which has an alternative period which embraces nineteen years. The respondent, no doubt, maintains that the lease cannot be restricted—that the Court has no power to do so—and that an alternative lease makes an indefinite ish, and, as such, is bad. But this plea is untenable. There is a great difference between an alternative or conditional ish, and an indefinite ish. This is not the case of an indefinite ish, but of a lease having alternative periods of duration, each of which periods having a definite ish, and, therefore, the lease is good.

Pleaded for the Respondent.—1st, The lease of Edstoun was prohibited by the general prohibition of the entail.

2d, It was not granted in the fair and legal exercise of the power of granting leases, contained in that entail.

After hearing counsel,

The Lords Spiritual and Temporal in Parliament assembled: Find that the Duke of Queensberry had not power under the entail, founded upon between the parties in this cause, to let tacks, partly for rent reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renunciation of former tacks, which were granted, partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made, partly for rent reserved, and partly for sums and prices paid to the Duke himself; and that the tack in question having been granted, partly for rent reserved, and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid, besides the rent reserved, the same is to be considered as a tack, partly for rent reserved, and partly for a sum and price paid to himself, and ought not to be considered in a question with the tenant claiming under the said tack, as let without evident diminution of the rental. And it is ordered that with this finding, the cause be remitted back to the Court of Session, to do therein as is just and consistent with this finding.

Journals of the House of Lords.

For the Appellant, *James Moncreiff, Fra. Horner.*

For the Respondent, *John Leach, F. Jeffrey, J. H. Mackenzie.*

[Crook.]

THE RIGHT HON. EARL OF WEMYSS AND MARCH, ... *Appellant;*

MARGARET JOHNSTON, Tenant in Crook, and JOHN HUTCHISON, her Husband, . *Respondents.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—ISH—GRASSUMS.—In the Neidpath entail there was no express prohibitory clause, either against granting leases or against taking grassums, but there was a prohibition to *alienate*. There was a permissive clause to grant leases for the granter's lifetime, or the lifetime of the receiver thereof, always without evident diminution of the rental. A lease was first granted for twenty-six years, at £12 of yearly rent, with £115 grassum paid. This

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was renounced in 1791 for a fifty-seven years lease at same rent, with no grassum paid. This lease, before its expiry, was also renounced for a new lease, with an alternative period of duration for 31 years, or for 29, 27, 25, 23, 21, or 19 years, which ever the Duke might be found to have power to grant. It was contended, that the lease was just a continuation of the first, and affected by the grassum then taken, and also that it was granted with evident diminution of the rental, and beyond the duration allowed by the entail. Held, that as no grassum was paid, the lease was not void on that ground, and the Court sustained the lease for twenty-one years. In the House of Lords remitted for reconsideration, with doubts expressed.*

* It appears to me to be a most extraordinary thing that a lease of such a nature as this, with such an interminable ish, can be a good lease."—*Lord Eldon's speech.*

It has been seen in the previous appeals, that the Neidpath and March entail contained no prohibition against leasing; but only against selling and alienating.

There was a permissive clause authorising the heirs of entail, "to set tacks or rentals of the said lands and estate "during their own lifetimes, or the lifetimes of the receivers "thereof, the same being always set without diminution of "the rental."

The present case originated like the cases of Whiteside and Edstoun.

In 1731, the Inn of Crook, together with a few acres of ground, was let at a rent of £8, 6s. 8d.

In 1780, the Duke granted a new lease to Thomas Johnston, the respondent's father, for twenty-five years, at the yearly rent of £12. The tenant, in addition, was taken bound to pay the public burdens for which the property was liable; and for this lease the Duke received a grassum of £115.

After possessing about ten years, the tenant finding the inn too small, expended a considerable sum in building additions to the house and offices. In consideration of which he asked and obtained from the Duke a new lease for fifty-seven years, from Whitsunday 1791, upon renouncing the former lease. Instead of taking the tenant bound to pay the public burdens, the payment was undertaken by the Duke, but the amount was added to the rent; and in this way the rent of Crook came to be £12, 15s. 5d. No grassum was paid for this lease.

Thomas Johnston, the tenant, having died, his daughter, the respondent, succeeded to the lease under which she continued to possess till 1807, when, as the Duke's powers had been struck at by the decision in the Court of Session in the

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Wakefield case, she, like the other tenants, renounced her fifty-seven years' lease, and obtained in place of it a lease for thirty-one years, or for such other alternative period of 29, 27, 25, 21, or 19 years, as the Court of Session, or your Lordships, should find to be the longest of these periods for which the Duke had power to grant a valid lease of the said subjects. The Duke, at same time, granted an obligation, in case the judgment in the Wakefield case should be reversed in the House of Lords, to grant new leases for fifty-seven years as formerly.

In 1809, the appellant had brought an action of declarator against the Duke and the tenants on the March estate, to have it found and declared that it was not in the power of the Duke to let leases of any part of the said estate, for a longer period than his own lifetime, or the lifetime of the receivers thereof, except agreeably to the Act 10 Geo. III. c. 51; and that all tacks granted upon payment of grassums, were prejudicial to the next heir of entail.

This action was remitted to, and afterwards conjoined with the process of declarator at the instance of Alexander Welsh, one of the Duke's tenants, brought for the purpose of trying the validity of his lease of the farm of Harestanes. The Duke died, and these actions were transferred against the Duke's executors. The conjoined actions were subsequently reported to the Court, on informations regarding the fifty-seven years' lease, when an interlocutor was pronounced, assoilzeing the appellant, the Earl of Wemyss, from the conclusions of Welsh's declarator, and the general declarator was remitted to Lord Hermand as Ordinary.

After an interlocutor, ordering the defenders (respondents) to produce the contracts, the Lord Ordinary pronounced an interlocutor, finding nothing stated "relevant to take the "case out of the predicament of the other leases on the Neid- "path estate, which have been set aside by the Court; sus- "tains the reasons of reduction; reduces, decerns and "declares accordingly." May 16, 1815.

On representation, his Lordship adhered. And, on reclaim- May 31, 1815.
ing petition to the Court, the Court pronounced this in-
terlocutor:—"Alter the Lord Ordinary's interlocutor re- Nov. 17, 1815.
"claimed against; and, in respect it appears that no grassum
"was paid for the tack, under reduction, sustain the same
"as a valid and effectual tack for the restricted endurance of
"twenty-one years from the date hereof; and to that extent
"sustain the defences in the conjoined processes of reduction

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" and of declarator, and assoilzie to the extent, from the con-
" clusions of the libels in the said process, and decern." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The lease of Crook (1807) was substantially let for a grassum. This appears from the circumstance that it was neither more nor less than a continuation of the lease granted in 1780, and which was then granted on payment of a very large grassum. The fifty-seven years' lease, let in 1791, was substituted in place of the lease of 1780; the yearly rent under all these various leases remaining the same. All these leases must, therefore, equally be regarded as let for grassum; the grassum taken originally affecting them all.

2d, Supposing the fact to have been, that the leases in 1791 and 1807, were granted without other considerations than the rent, then it would follow that the Duke had made a present to the tenant of value to a certain amount, at the expense of his heirs of entail. But his Grace was not at liberty to make a present of that kind, at the expense of his heirs of entail.

3d, In fact, it is not said that the Duke granted the leases of Crook in 1791 and 1807, without consideration. But the consideration taken by the Duke, is said to have been a discharge, for certain repairs which had been made by the tenant on the inn, and which the Duke found himself bound to pay. Of this there is no evidence. It is not said that the lease bears that this was the consideration for which it was entered into on the part of the Duke. But let it be supposed that it really was the case, that for the prolongation of his lease at the same rent, the tenant discharged the debt due to him by the Duke, this is just the same as if the Duke had taken a grassum, inasmuch as he, in lieu of grassum, got a debt due by him discharged. The repairs, it will be observed, are not said to have been repairs stipulated *in futuro*, but past repairs, for which the Duke considered himself liable. These repairs, therefore, plainly were not at all of the nature of rent or future return for the farm, and, supposing the statement of the respondents to be true, they appear just to have been a debt of the Duke himself to the tenant. The discharge of such a debt, therefore, was, in fact, a new grassum.

4th, Besides, there is in this case a diminution of the rental, because no rent was stipulated in the leases of 1791 and 1807, to answer for the grassum of £115, payable under

the former lease. It was the duty of the Duke in letting the lease in 1791, to have preserved to future heirs of entail, a rental equal, not only to the return of the land, but also to a proportion of the grassum payable under the preceding lease. Not having done that, this lease was, therefore, let with diminution of the rental; and the lease of 1807, which he substituted for that in 1791, must have the same quality.

5th, The lease was let for a term not authorised by the permissive clause in the entail, and not necessary in the fair administration of the estate.

Pleaded for the Executors and Trustees.—They pleaded as in separate case, *vide* next page.

Pleaded for the Respondent, the Tenant.—1st, The lease in question, restricted as it has been, by the interlocutors, to the length of twenty-one years, was competently granted by the late Duke of Queensberry, in virtue of the powers which he enjoyed as a proprietor of the estate, and is struck at by no prohibition or limitation in the deed of entail. It is, at all events, good for the period to which it has been restricted, by the interlocutors appealed from.

2d, There is no ground for maintaining that the lease was granted for a grassum. Holding it to be a substitute for the fifty-seven years' lease granted in 1791, no grassum was paid either then, or when the substitution was made in 1807.

It is not denied that there was a grassum paid in 1780; but the endurance of the lease, which was bought by that grassum, terminated in 1805.

The commencement of the present lease in 1807, was two years subsequent to the expiry of the lease of 1780, the only lease for which the Duke received a grassum. It is impossible, therefore, either to hold that the present lease was substituted for any part of the lease 1780, or that it has any connection with the grassum, for which that lease was granted. And the respondents submit, that the fair view of the case is to consider the first fourteen years of the renewed lease of 1791, as the remainder of the lease 1780, and the subsequent period of it, an additional term, granted in consideration of the expense laid out by Johnston, in improvements. These expenses, the Duke was in no way individually bound to repay; but, as the extent and permanency of these improvements, rendered them valuable to the appellant and subsequent heirs of entail, as well as to the Duke, and, as the tenant was taken bound, not only to uphold and keep good the buildings during the currency of his lease, but to leave them so at its

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expiry, the prolongation of the lease seems to have been but a reasonable return for the advantage thus derived to the estate.

3d, There was in this case no diminution of rental. The appellant has maintained the reverse; because, as he contends, no sum has been added to the present rent, to answer for the grassum for £115, paid in 1780. This is assuming that grassum is rent taken by anticipation. The respondents maintain that it is a payment altogether different and distinct from rent. But it would be improper to enter more fully into the discussion of that point, as it is fully argued in the cases of Whiteside and Edstoun, before referred to.

Vide Judgment at the end of next case.

For the Appellant, *John Leach, F. Jeffrey, J. H. Mackenzie.*

For the Respondents, *James Moncreiff, John Cuninghame.*

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[Case of the Executors; Farm of Crook.]

THE EARL OF WEMYSS v. MONTGOMERY, &C.

EARL OF WEMYSS AND MARCH, . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry, ... } *Respondents.*

House of Lords, 7th April 1819.

The respondents lodged a separate case in this appeal, in which, after stating the circumstances as detailed in the preceding appeal, they

Pleaded for the Respondents.—The lease in question, restricted as it has been by the interlocutors appealed from, to the length of twenty-one years, was competently granted by the late Duke of Queensberry, in virtue of the powers which he enjoyed as proprietor of the estate, and is struck at by no prohibition or limitation contained in the entail.

The First Division of the Court has, no doubt, found that the Duke had no right to take grassums, but this judgment

has been appealed from, and the question will come fully before your Lordships in the leading cases of Whiteside and Edstoun. If your Lordships shall then see cause, as the respondents trust you will, to reverse the decisions of the Court in these cases, the objection of grassum will fall to the ground. But even, should this not be the case, there is no room for holding the present lease, to have been granted for a grassum, either directly or indirectly. It is impossible, on any fair view of the circumstances, to connect it with the lease 1780. If it is competent at all to look back beyond the present lease, it can only be done for the purpose of getting at the true nature of the whole transaction betwixt the parties. But, taking matters in this light, what the Duke really did in granting the lease 1791, was to extend, for an additional period, the lease, upon which Johnston, the tenant, was then possessing. The fair and equitable way of viewing the transaction, is to hold the first fourteen years of the new lease to be the remainder of the old lease, to which, of course, the grassum might be applicable, and the subsequent part of the period to be an additional term, granted in consideration of the improvements made by the new buildings.

Whenever the fourteen years had run, therefore, that portion of the lease of 1791, which had any reference to the grassum received in 1780, was at an end; and the objection of the grassum can no more be applicable to the remaining portion than it could have been, had the lease of 1780 been allowed to expire naturally in 1805, and a new lease for forty-three years had been granted. But the present lease was not entered into till 1807, two years after the lease of 1780 must have been at an end.

But, it is said that here there was also a case of diminution of the rental. This objection rests on an assumption, that a grassum consists of a part of the rent taken by anticipation. But, the respondents maintain that it is a payment altogether distinct from, and independent of, the rent. If the entail prohibits diminution, it does not require any augmentation of the rental. It was *competent, therefore, for the Duke to keep the rent stationary*, and, if a lease at the old or former rent had come to be a favourable one for the tenant, he was entitled to take what consideration he could obtain, in return. The grassum is a price given for the beneficial lease; it makes no part of the rent, or annual prestation payable under it, and the Duke was not guilty of diminishing the rental, because he did not augment it as far as he might have done.

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After hearing counsel upon the original appeal, and appeal of the Right Honourable Francis Charteris Douglas, Earl of Wemyss: and likewise upon the cross appeal of Margaret Johnston, tenant in Crook, and John Hutchison, her husband, as also upon the answer of Margaret Johnston *alias* Hutchison, and her husband foresaid; and the answer of Sir James Montgomery, Bart., and others, trustees appointed by the late Duke of Queensberry, put to the said appeal: and consideration being had of what was offered on both sides in these causes, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors complained of.

For Respondents, *Alex. Irving, Geo. Cranstoun.*

[Farm of Flemington Mill.]

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The RIGHT HON. FRANCIS, EARL OF WEMYSS, ... *Appellant;*

Sir JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WM. MURRAY, Esq. of Henderland, and EDWARD B. DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry, ... } *Respondents.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM.—In the Neidpath entail, there was a lease granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid for it. This lease was, in 1807, renounced for a new lease for thirty-one years, or such other term of 29, 27, 25, 23, 21, and 19, as it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid for this lease, that the same was good for twenty-one years. In the House of Lords, the case remitted for reconsideration.

The late William, Duke of Queensberry, possessed the estate of Neidpath, under an entail executed in 1693, by his

great grandfather, William, first Duke of Queensberry. By this deed, it is provided, "That it shall be nowise lawful to "the said Lord William Douglas, and the heirs male of his "body, nor to the other heirs of tailzie respectively above-"mentioned, nor any of them, to sell, alienate, wadset, or "dispone any of the said haill lands, lordships, baronies," &c. These prohibitions were secured by appropriate irritant, and resolutive clauses.

There was no prohibition, as is seen from the above clause, against the granting of leases; but there was the following permissive clause:—"It is hereby expressly provided and "declared, that notwithstanding of the irritant and resolutive "clauses above-mentioned, it shall be lawful and competent "to the heirs of tailzie, above specified, and their foresaids, "after the decease of the said William, Duke of Queensberry, "to set tacks or rentals of the said lands and estate, during "their own lifetimes, or the lifetimes of the receivers thereof, "the same being always set without evident diminution of "the rental."

The late Duke of Queensberry succeeded to the March estate in 1731, at which time the farm of Flemington Mill was let for the yearly rent of £69, 14s. 8d., the cess or land tax, being paid by the landlord. It continued to be possessed, at the same rent, down to the year 1769, with this difference only, that latterly the cess was paid by the tenant, in addition to the rent. Grassums to a greater or less amount were received, at granting the different leases.

In 1769, the farm was let for 19 years, at the rent of £107, and the tenant agreed, besides, to pay £157, 2s. 2d., of grassum. But this rent turned out to be higher than the tenant could afford; and the Duke was under the necessity of lowering it long before the end of the lease.

The lease was, in March 1781, advertised, and the Duke, after several failures, was obliged to let it to Mr Murray for £90 (Mr Murray was his tenant in two neighbouring farms, Whiteside and Fingland), who possessed it at this rent, up to 1788, being the period at which the lease expired.

At this time the Duke entered into a new lease with James Murray, for the whole three farms of Whiteside, Fingland, and Flemington Mill, for fifty-seven years, paying of yearly rent, for Whiteside, £109, for Fingland, £50, 10s., and for Flemington Mill, £90; and also paying on two of these farms a grassum of £400 (none for Flemington).

But, in 1807, after the decision in the Court of Session in

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the Wakefield case, doubts arose as to the Duke's powers to grant leases for so long a period as fifty-seven years, he, along with most of the tenants on the Duke's estate, thought proper to renounce what remained of this lease, for new leases. These new leases were granted separately of the three farms; and the present lease of Flemington Mill, was granted to himself, for thirty-one years, from Whitsunday 1807; but, as it was uncertain whether a lease of this duration would be sustained, there was a clause superadded, that if it should be found that the Duke was prevented by the entail from granting a lease for thirty-one years, then the lease should be for 29, or 27, or 25, or 21 or 19 years, whichever of these periods the Court of Session or House of Lords, should find to be the longest term for which the Duke had power to grant it.

For the last of these leases no grassum was paid.

Separate actions of declarator and action of reduction to reduce the lease, having been brought and conjoined, the Lord Ordinary thought that there was nothing stated to take this case out of the predicament of the other leases in the Neidpath estate, which had been set aside by the Court, and

May 16, 1815. sustained the reasons of reduction. On reclaiming petition to the First Division of the Court, their Lordships pronounced this interlocutor:—"Alter the Lord Ordinary's interlocutor "reclaimed against; and, in respect it appears that no grassum

Nov. 29, 1815. "was paid for the tack under reduction, sustain the same as "a valid and effectual tack for the restricted endurance of "twenty-one years from the date thereof; and, to that extent "sustain the defences in the conjoined processes of reduction "and declarator, and assoilzie to that extent from the con- "clusions of the libels in the said process, and decern."

On further reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Feb. 6, 1816. *Pleaded for the Appellant.*—1st, The lease of Flemington was let for a grassum. The general point, that under the entail of Neidpath, leases of any part of that estate, let for a grassum, are void, has been decided by the Court of Session in favour of the appellant, and the argument respecting it is stated in the case for the appellant, in the appeals respecting the leases of Easter Harestanes and of Whiteside. It does not appear to be necessary to state that argument in detail in the present case. The point here may be assumed. Under this head of the appeal, it is, therefore, only necessary to advert to the plea of the respondents, that there are special

circumstances in this case which prevent the rule regarding leases let for grassum, from applying to it. In considering this plea, it must be admitted, in the first place, that the original lease of Whiteside, Fingland, and Flemington Mill, in 1788, was bad, being for a grassum. In the next place, it is equally clear, that the lease for thirty-one years, substituted in lieu of this long lease, if it had been contained in one instrument of lease, must have been void, as a mere substitute for the original lease, to which the quality of grassum equally attached; but, if this be once admitted, it appears clearly to follow that the device or accident, no matter which, of putting this substitute grant of lease into three instruments instead of one, can make no difference; that these three instruments, granted *unico contextu*, must still be regarded as one grant, and the set must have precisely the same fate, as one instrument expressing the same transaction, would have had. On this point, it is sufficient to refer to the well-known case of the Roxburgh feus, where a great many feus being granted *unico contextu*, were held to be but one feu; and the present is a much stronger case, since, here, the right actually was *one*, before the separation into different instruments.

Accordingly, the Court of Session had no doubt as to the two other parts of the original lease in question, viz., the *pro forma* new leases of Whiteside and Fingland. The Court held each of these to be parts of a lease substituted for the original long lease, let for a grassum, and reduced them accordingly. It is conceived, however, that *the third* part of this substitute, *i.e.* the *pro forma* separate lease of Flemington, never can be in any different situation from the two others, but must be reduced, as it was by the interlocutor of the Lord Ordinary. The respondents are sensible of the force of this, and attempt to escape from it by bringing forward into the case other circumstances of a date anterior to the grant of lease for grassum, in 1788—circumstances which, the appellant conceives, are neither proved, nor at all relevant in this case. The object of the respondents in this statement is to show, first, that although, in 1788, the lands of Flemington formed part of a farm, let without any division as one farm, to one tenant, for one rent and for one grassum, yet no part of the grassum was paid for the lease, in so far as related to these lands; and consequently, that the part of the renewed lease in 1807, which is applicable to them, was not affected by the objection of grassum. For this purpose,

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letters alleged to have been written to the late Duke of Queensberry, by his man of business, Mr Tait, have been produced. Now, it is conceived to be impossible, to listen at all to such averments. An instrument, granting a farm in lease for rent and a grassum, is conclusive evidence that every part of that farm was let for grassum, as well as for rent. It appears altogether inadmissible in the tenant to attempt, in the face of the lease, to pick out particular fields or portions of land, and say, that as to these, the grassum did not apply, and as to others it did apply. The lease itself makes no such distinction or application as to the grassum. It is proved by that instrument, that the whole farm together, all and every part of it, was let for a grassum.

2d, Besides, the lease of Flemington was not let "without "diminution of the rental." In 1769, it was let for £107, with a grassum of £157, 2s. 2d. In 1807, it is let at the rent of £90.

3d, This lease was also let for a term of years not authorised by the power of letting leases, contained in the entail of Neidpath, and was also greater than was necessary in the fair administration of the estate. The Court of Session admitted this by cutting down the lease from thirty-one to twenty-one years. But, there is no ground for sustaining it to any extent. Being prohibited by the primary clauses of the entail against alienation, and not being permitted by the power of letting leases, it must fall under the clause irritant, and so be wholly void.

Pleaded for the Respondents.—In 1807, when the present lease was entered into, the Duke had no power of varying the rent which had been stipulated in the previous lease of 1788, for fifty-seven years, then renounced; for the sole object of the transaction then was, to remove the objection which, it was feared, would be raised against the latter lease, on the ground of its length. But, though the rent was not raised then, it was not diminished; for that payable by the lease, was exactly retained. There is nothing in the entail which made it incumbent on the Duke to raise the rent above what it had been under the immediate preceding lease, if this was a valid and effectual contract; though it may have happened that a higher rent had been promised by some earlier lease.

The lease, which is the subject of reduction, restricted as it has been by the interlocutors appealed from, to the length of twenty-one years, is one which the Duke could legally grant,

in virtue of the powers he enjoyed under the entail, and which was granted without payment of any grassum.

Vide Judgment at the end of next case.

[Case of the Tenant; Flemington Mill.]

THE EARL OF WEMYSS, ... *Appellant;*

JAMES MURRAY, ... *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM—BONA FIDES.—Under the Neidpath entail a lease was granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid. It was renounced in 1807, for a new lease for thirty-one years, or for 29, 27, 25, 23, 21, or 19, whichever it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid, the lease was good for twenty-one years. In the House of Lords, remitted for re-consideration.

James Murray, the tenant under the lease of the three farms of Whiteside, Flemington Mill, and Fingland, granted by the Duke for fifty-seven years, it has been seen, was one of the tenants in whose favour the Flemington Mill farm was granted, in 1807, for thirty-one years, or alternatively, for whichever of the terms of 29, 27, 25, 21, or 19 years, the Court of Session, or your Lordships, should ultimately find the Duke had the power to grant. The rent stipulated being £93, 9s. 1d., the previous rent having been £90, and as that previous rent was acknowledged by the Duke's commissioner to be its full value, there was no grassum paid for it (the grassum of £400 then paid being for Whiteside and Fingland). And the argument he pleaded was as follows:—

Pleaded for James Murray, the tenant.—The lease in question was competently granted by the Duke of Queensberry, in virtue of the powers which he enjoyed as proprietor of the estate, and is struck at by no prohibition or limitation in the deed of entail; and it is farther secured to the respondent by the Act 1449, c. 17. It is, at all events, good for the period to which it has been restricted by the interlocutors appealed from.

Even if, contrary to the heretofore invariable practice, and to the established doctrine of the law of Scotland, the inter-

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locutors of the First Division of the Court of Session, in the other causes before your Lordships, finding that the taking a grassum invalidates the leases, should be affirmed, it is, nevertheless, distinctly in evidence in this cause, that no grassum was given for the present lease of the farm of Flemington Mill. With the grassum given by Bryden in 1769, for the lease relinquished by his representative, Simpson, in 1780, neither James Murray, the respondent's father, nor the respondent, can by possibility, be connected. That the grassum paid when the lease of Whiteside, Fingland, and Flemington Mill, was entered into in 1788, was paid for the two former alone, Mr Tait's letters abundantly prove. In favour of the respondent, the evidence of these letters is unexceptionable; and they establish, beyond a doubt, that the respondent's father expressly refused to give any grassum for the farm, either in 1782 or in 1788, and that the lease, so far as regards Flemington Mill, was granted without grassum accordingly. Had it been otherwise, the respondent would have maintained upon the grounds stated in the cases of Whiteside and Edstoun, that the taking of grassums on entailed estates was in general practice, and completely legal.

2. Mr Tait's letters prove, also, the necessity of reducing the rent from £107 to £90. Every effort was made by the Duke's agent, by public advertisements, and otherwise, to get the highest possible rent for the farm. To hold that the restriction as to diminution of the rent would apply in such circumstances, would be to contend that an heir of entail might, by a fall in the value of agricultural possessions, be altogether incapacitated from letting any part of an entailed estate—a proposition obviously absurd. The rent obtained in 1782 was a *bona fide* rack-rent, and must be the standard by which diminution in the succeeding lease of 1788 must be judged of. No diminution, however, then took place; and the present lease is to be considered not as a new one, but as a substitute for the lease of 1788, fairly entered into in 1807, by both parties.

But the respondent further maintains, that the restriction as to diminution of the rental, applies only to liferent leases: it occurs in no part of the deed of entail, but in the permissive clause, where it is imposed in relation to liferent leases only.

Journals of the House of Lords.

After hearing counsel upon this appeal, and likewise upon the cross appeal of James Murray, tenant in Flemington

Mill. As also upon the answer of James Murray, tenant in Flemington Mill, and the answer of Sir James Montgomery and others, trustees appointed by the late Duke of Queensberry, put into the said original appeal; and the answer of the Right Honourable Francis Charteris, Earl of Wemyss and March, put into the said cross appeal; and consideration being had of what was offered on both sides in these causes, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

For the Appellant, *John Leach, F. Jeffrey, J. H. Mackenzie.*

For the Respondents, the Executors and Trustees, *Jas. Moncreiff, John Cunninghame.*

For the Respondent, the Tenant, *Jas. Moncreiff, John Cunninghame.*

[Liferent Leases; Whiteside.]

WILLIAM MURRAY, Tenant in Whiteside, *Appellant;*

The EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS TO GRANT LEASES—GRASSUM.—(1.) In the Neidpath entail there was no express prohibition against granting leases or taking grassums, but there was a prohibition "to *alienate*" the lands, or any portion thereof. There was a permissive clause to grant leases for the lifetime of the heir, or lifetime of the receiver, the same being granted without evident diminution of the rental. In this case, a lease had been granted in 1788, for fifty-seven years, with a grassum paid. That lease, in 1807, was renounced for a lease for the tenant's life, at the same rent as the former. Held, that this latter tack must be held as merely a substitute for the former, and subject to every objection on the ground of grassum, and that, though the new tack was in compliance with the entail as to endurance, yet, as it was affected by the grassum formerly paid, and as it was granted at the same rent, plus the cess and other rogue money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords. (2.) The tenant pleaded, that whatever

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might be the result of the question with the executors, it could not affect the tenant entering into the lease in *bona fide*, and that he was protected by the Acts 1449, c. 17, and 1685, c. 22, as the acquirer of an onerous real right; but this plea repelled.

The appellant was tenant of the farm of Whiteside, on the Neidpath and March estate.

The clauses in the Neidpath entail have already been quoted in the preceding appeals.

The farm of Whiteside had been let in 1686, on a lease for five years, at the rent of 800 pounds Scots, or £66, 13s. 4d. This was the rental of that farm at the date of the entail. When the late Duke of Queensberry succeeded, in 1731, the rental of that farm was £68, 8s. 4d., so that, in a period of forty-five years before his succession, the increase of the rental was precisely £1, 15s.

During the possession of the late Duke, the rent of this farm was considerably increased; and, it is admitted, that previous to the year 1807, the farm was let at the rent of £113, 12s. $2\frac{9}{12}$d on a lease which had been granted in 1788 for fifty-seven years, including in that lease the other farms of Flemington Mill, at £90 yearly rent, and Fingland at £50, 10s., with a grassum paid for Whiteside and Fingland, of £400.

In December 1807, a lease was granted by the late Duke to the appellant, of the farm of Whiteside, "for all the days "of the said William Murray's life, from and after the term of "Whitsunday 1807, which is hereby declared to have been "the term of the said William Murray's entry." The yearly rent of £113, 12s. 2d. was agreed to be paid, which was precisely the rent payable by the former lease, and the highest rent for which these lands had, at any former period, been let.

On this lease the appellant obtained possession. He continued in peaceable and undisturbed possession for two years. And, as the entail, not only contained no prohibition against granting liferent leases, but contained an express clause, declaring it to be lawful for the heirs of tailzie to grant leases "during their own lifetimes, or the lifetimes of the receivers "thereof," on the single condition, that they should be let without evident diminution of the rental; the appellant never for a moment imagined that a lease for his own lifetime, and for the highest rent that the lands had ever yielded, could admit of any possible challenge under the prohibitory, irritant, and resolutive clauses, in this entail.

But the respondent brought, in 1809, an action of declarator against the Duke of Queensberry and his whole tenants, specially enumerated, among whom was the appellant.

It was not easy to see what good reasons there were for this summons as against the appellant. His lease had been granted at the full rent, and was, in point of duration, in precise conformity with the entail. The respondent, however, alleged, that he (the appellant) had paid a grassum; which allegation was made to depend on an attempt to connect it with the lease which had previously existed, and on which the appellant's father had possessed from 1788 till 1807, when he renounced it.

In addition to the declarator, the respondent, in 1811, brought actions of reduction and removing against the several tenants, and among the rest, against the appellant. This action, as against him, set forth, that his lease ought to be set aside, because it was *ultra vires* of the Duke to grant the tack in question, the same having been granted in consideration of a fine or grassum paid by the said defender (appellant).

In defence, the appellant stated, 1st, That the pursuer had not called all the parties interested, as he had not called the executors of the Duke of Queensberry; and 2d, That such lease was not only not prohibited by the entail, but was expressly permitted.

But, from these facts, the pursuer inferred and argued, that the liferent lease of Whiteside, now held by the appellant, was to be considered as a substitute for the previously subsisting lease of that farm for fifty-seven years; that as a grassum had been paid for that lease, some proportion of that grassum must be applied to the liferent lease, and that the lease was therefore liable to challenge on two grounds, 1st, That it was in diminution of the rental; and, 2d, That in so far as a grassum was taken on it, it was to be deemed an *alienation*, and as such, contrary to the prohibitions of the entail.

On advising the cause, Lord Hermand, Ordinary, pronounced this interlocutor, "Having advised the condescen- June 14, 1814.
"dence and answers in the process of declarator, and also
"the condescendence and answers in the process of reduction
"at the instance of the Earl of Wemyss and March, against
"William Murray, and whole processes, conjoins this process
"with the declaratory action between the parties depending
"before the Lord Ordinary, in so far as the declarator is

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" applicable to the present case: Finds it stated in the con-
" descendence, and not denied in the answers, that the whole
" farms whereof the leases are now under reduction, were
" formerly let by the late Duke of Queensberry for fifty-seven
" years, and, with an exception stated by the defender, of the
" lands of Flemington and Crook, under burden of grassums,
" the interest of which bore a considerable proportion to the
" yearly rent: Finds it admitted in the answers, that in or
" about the year 1807, many of the tenants, holding leases
" for fifty-seven years, renounced their leases, and took new
" ones for periods equal to the terms unexpired of the old
" ones, but without paying any grassums for their new
" leases; and that soon afterwards the tenants of all the
" farms as to which the present discussion relates, whether
" they had got new leases of the nature above mentioned, or
" had continued to possess, on their fifty-seven years leases,
" executed renunciations, and accepted of the existing leases,
" for which they paid no grassums: As also, that when the
" tenants renounced their former leases, and took the present
" ones, contracts were entered into betwixt them and the
" Duke's commissioner, Mr Tait, as stated in the condescend-
" ence: Finds, that although it be stated by the respondent,
" that depending on a contingency not explained, but said to
" have existed, these contracts never were acted upon, yet,
" they afforded evidence to show that the new leases were,
" with the exception of the term of endurance, a *surrogatum*
" or substitute for those which had been renounced: Finds,
" that the rents payable under those renounced leases must
" of necessity have been from the inconvenience and loss
" arising to the tenants from the advance of money, a con-
" sideration of the doubts of the powers of the lessor held
" out in the contracts, and other circumstances, have suffered
" a greater reduction than the amount of the interest of the
" sums paid in name of grassum: Finds, that the entail
" founded on by the parties in this cause, contains a clause
" by which it is expressly provided and declared, 'That, not-
" 'withstanding of the irritant and resolutive clauses above-
" 'mentioned, it shall be lawful and competent to the heirs
" 'of tailzie, therein specified, and their foresaids, after the
" 'death of the said William, Duke of Queensberry, to set
" 'tacks of the lands and estate during their own lifetimes,
" 'or the lifetimes of the receivers thereof, the same being
" 'always set without diminution of the rental:' Finds, that
" the rent payable under the renounced leases, diminished as

This clause so written in the original.

"it was by payment of grassums, cannot be considered as "constituting a fair rental, such as is implied in the above "clause: Finds, that the lease under reduction, though it "might be supported by the first part of that clause, as "granted for the lifetime of the receiver, is cut down by the "concluding part of it, being set with evident diminution of "the rental: repels the defences in the declarator, sustains "the reasons of reduction, repels the defences therein, and "reduces, decerns, and declares accordingly."

On representation, his Lordship adhered. July 9, 1814.

On reclaiming petition to the Court, the following interlocutor was pronounced, "The Lords having advised the said Feb. 3, 1815. "reclaiming petition, and having heard the counsel for the "parties at great length, in their own presence, on the whole "pleas and points in the cause, they find that the entail in "question contains a strict prohibition against alienation, "but a permission to grant tacks of the said lands and estate "during their own lifetimes, or the lifetimes of the receivers "thereof, the same being always set without evident diminu- "tion of the rental: Find, that in the year 1769, the peti- "tioner's father obtained a tack of Whiteside, for nineteen "years, at the rent of £109, for which he paid a fine or "grassum of £132, 18s. 10d.: Find, that in the year 1775, "the petitioner's father obtained a tack of the farm of Fing- "land for twenty-five years, at the rent of £50, 10s., for "which he paid a grassum of £480: Find, that in the year "1788 he renounced this lease, of which twelve years were to "run, and obtained a new lease for fifty-seven years, of the "said farm of Fingland, and also of the farms of Whiteside "and Flemington, at the rent of £260, 16s. 4d., being the "amount of the old rents, payable under the former tacks, "with the additions of the cess, and rogue, and bridge, money, "amounting to £11 odds, for which he paid a grassum of "£400, which was declared to be for Whiteside and Fing- "land only: Find, that in the year 1807, the petitioner's "father renounced the said tacks, and took new tacks to him- "self and sons for their lifetimes, at the rents payable under "the tacks renounced: Find, that this current tack must be "held merely as a substitute for the former ones, and sub- "ject to any objections on the ground of grassum, diminu- "tion of rental and otherwise, which were competent against "the tacks renounced: Find, that in estimating the rents of "Whiteside and Fingland, the value of the fines or gras- "sums paid at the commencement of the former tacks, ought

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" to have been added to the annual-rent: Find, that this " was not done, and that the new rent was made the same " as the old rent, plus the cess and bridge money: Find, " that this was not equal to the value of the grassum taken, " and, therefore, that the said last tack of Whiteside and " Fingland was set with evident diminution of the rental, " and in violation of the said clause in the entail: Further, " find that the conversion of part of the new rent into a fine " or grassum of £400, was to the manifest prejudice of the " succeeding heirs of entail, and operated as an alienation " *pro tanto* of the uses and profits of the estate: Therefore, " although the said tacks in point of endurance, do fall " within the permission of the entail above referred to, Find, " that they are struck at by the clause prohibiting alienation, " as well as by the condition in the said permissive clause, " against evident diminution of the rental: Therefore, in the " process of declarator, repel the defences, and in the process " of reduction repel the defences; sustain the reasons of re- " duction, and reduce, decern, and declare accordingly, so far " as concerns the tacks of Whiteside and Fingland; but in " regard no grassum appears to have been taken for the " farm of Flemington, and that by the tack renounced, the " rent has been raised, they so far sustain the defences in " the process of declarator, and in the process of reduction " assoilzie from the conclusions of the libel therein, and " decern."

On reclaiming petition the Court adhered, excepting in so far as concerned Flemington Mill, in " respect the ques- " tion concerning it, was not regularly before the Court at " the date of the said former interlocutor, they recall the said " interlocutor so far as relative to the said lands and Mill of " Flemington, as not duly pronounced."

Nov. 29, 1815.

Vide separate appeal as to it.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The appellant obtained the lease of the farm of Whiteside, as a third party contracting onerously, and in *bona fide* with the Duke of Queensberry, on the faith of the records. By this contract of lease, followed by possession, and the payment of rent, he holds, in terms of the statute 1449, c. 17, a real right in the lands as a purchaser of the said lease, effectual, not only against the granter and his representatives, but against all singular successors in the fee, in so far as the granter had power to make it. And the question in this action for reducing the lease, is

precisely the same question which might have been raised by the respondent, if this had been the only lease created by the late Duke of Queensberry, or the only lease objected to by the heir of entail, and if the Duke had left no separate funds or estate, and were not represented universally by any party whatever.

The statute 1685, c. 22, regulating entails, enacts "that it "shall not militate against creditors *and others singular* suc- "cessors, who shall happen to have contracted *bona fide* with "the person who stood infeft in the said irritant and re- "solutive clauses in the body of his right."

It is under this statute alone that the respondent can challenge any lease in the person of a tenant, as in contravention of the entail. And your Lordships will perceive, that the statute itself draws a marked line between the case of gratuitous deeds or acts of contravention, which personally affect the contravener, and the case of onerous transactions, where the interest of a third party is to be cut down. This is so clear, that there may be a case where the heir will forfeit his whole right in the estate, and yet the right of the party in whose favour the deed was made will stand secure. Generally, the prohibitory clause alone, without irritant or resolutive clauses, and without registration, is sufficient to bind personally the heir in possession. But nothing can affect third parties but express conditions or prohibitions, fortified by irritant and resolutive clauses, and all appearing in the procuratories of resignation, precepts of sasine, and infeftments of the estate, and also in the register of tailzies. And it is evident, that in laying down this distinction, the statute does, in so many words, declare that the person so possessing an entailed estate is not a mere liferenter, but the *proprietor in the fee*, and to be esteemed the *absolute* proprietor of it, except in so far as his powers are expressly limited by clauses appearing in the records, in terms of the statute.

Consequences of material importance in the present argument necessarily result from these undeniable doctrines of law. One consequence is, that, though in all cases of entails with irritant or resolutive clauses, whether in questions with the proprietor himself, with his gratuitous donees, or with creditors or purchasers, the restrictive clauses must be strictly interpreted, and not extended, by implication, beyond the legal import of the words employed, yet this rule applies with double force, and for additional reasons where the question relates to the rights of third parties contracting onerously. It is perfectly evident that the heir of entail may have a good

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cause of complaint, and even legal claims of damages against the heir in possession, or his representatives, and yet have no relevant ground of reduction for setting aside the lease of any tenant. Where there is a prohibition to sell the estate, but this is not fortified with irritant and resolutive clauses, a sale is good to a purchaser. And yet it has been held that, in that case, the heir who sells is liable in damages. Some doubts have recently been entertained about this doctrine; but these do not affect the present argument.

2. The late Duke was therefore proprietor of the estate, fully invested therein, and enabled effectually to exercise all the powers which belonged to any other proprietor, except in so far as he was *expressly restrained* by plain and explicit words in the body of his infeftment. No prohibition can be raised by implication. There is no prohibition against grassums. There is no prohibition against granting leases of any kind of endurance. It is, therefore, raising a prohibition by implication, to say that taking a grassum is an alienation; and that granting a lease for the lifetime of the receiver is an alienation, although this latter kind of lease is expressly permitted by the entail.

Pleaded for the Respondent.—The appellant has attempted to found upon some plea to favour as a *bona fide* onerous contractor or acquirer of the lease. It is quite unnecessary to go into any detailed answer to his arguments. There are two considerations, either of which is perfectly and obviously conclusive against this plea. In the first place, the entail of Neidpath was duly recorded, after which, no party is entitled to plead *bona fides*, in accepting any right granted in contravention of that entail. Parties contracting in contravention of a recorded entail, are no more entitled to plead *bona fides*, and to complain of hardship, than if they had contracted in contravention of a registered inhibition. The second consideration is, that in this particular case, it is certainly and manifestly false in point of fact, that the present appellant had any *bona fides* in accepting his lease. It is unnecessary to resume the narrative of the facts of the case. It is sufficient to say, that the complete notoriety of the whole proceedings and views of the late Duke of Queensberry, rendered it impossible for any of his tenants to be ignorant *de facto*, that there was an entail; and that he was anxious to defeat, as far as possible, the rights of the succeeding heirs under that entail. The tenants in general (tempted by the hopes of large profit), there can be no doubt,

deliberately, and with a full knowledge of all the circumstances, joined in this attempt; and as to the appellant, William Murray, in particular, considering the renunciation of the lease of Flemington by his father in 1788, and the grassum paid upon that occasion for the lease of the three farms jointly, the subsequent renunciation of the fifty-seven years lease in 1807, and acceptance of *pro forma* separate leases, with conditional extension for ninety-seven years by additional contract, it is an absurdity to talk of *bona fides*. It is palpable, that the appellant, William Murray (for his father, the true party) had not one atom of *bona fides* more than the Duke himself.

After hearing counsel,

The Lords, Find, that William, late Duke of Queensberry, had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon the renunciation of former tacks which had been granted, partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for rent reserved, and partly for sums or prices paid to the Duke himself: and the Lords further find, that the tack in question ought to be considered in this question with the tenant, as granted, partly in consideration of rent reserved, and partly in consideration of a price or sum before paid to the Duke himself, and of such renunciation as aforesaid, and as a tack set with evident diminution of the rental. And it is ordered, that with these findings, the cause be remitted back to the Court of Session, to do therein as is just and consistent herewith.

For the Appellant, *James Moncreiff, Fra. Horner.*

For the Respondent, *John Leach, F. Jeffrey, J. H. Mackenzie.*

[Declarator as to Whiteside, &c.]

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq.; WILLIAM MURRAY, Esq. of Henderland, and EDWARD BULLOCK DOUGLAS, Esq., Barrister-at-Law, Trustees and Executors of the late William, Duke of Queensberry, } *Appellants;*

EARL OF WEMYSS, . . . *Respondent.*

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MONTGOMERY, &c. v. THE EARL OF WEMYSS.

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—GRASSUM.—In the Neidpath entail, there was no express prohibition against granting leases, or taking grassums, but there was a prohibition "to *alienate*." There was a permissive clause to grant leases for the lifetime of the heir, granter thereof, or the lifetime of the receiver, but without diminution of the rental. A lease was granted in 1788, for fifty-seven years, with a grassum paid. This lease was, in 1807, renounced for a new lease, for the tenant's life, at the same rent as the former, plus the cess and rogue money. Held, that this latter tack must be held as a mere substitute for the former, and subject to every objection, on the ground of grassum, and that though the new tack did not exceed the endurance permitted by the entail, yet, as it was affected by the grassum, and by being granted at the same rent as formerly, plus the cess and bridge money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords.

This is the appeal brought by the executors and trustees of the Duke, under the same circumstances, and in regard to the same lease as mentioned in the previous appeal, the interlocutors pronounced therein having reference to the three farms of Whiteside, Flemington Mill, and Fingland.

In 1731, the farm of Whiteside was under lease to a predecessor of the present tenant, at the rent of £68, 8s. 4d.

In 1744, it was let from Whitsunday of that year at the same rent, and a grassum of £16, 13s. 4d. It was again let by the Duke on a nineteen year's lease, from Whitsunday 1769, to James Murray, grandfather of the present tenant. The rent stipulated being £109, and a grassum was then paid of £132, 18s. 1d.

The same James Murray afterwards obtained a lease of the farm of Fingland for twenty-five years, from Whitsunday 1775, at the rent of £50, 10s., with a grassum of £480.

In 1782, James Murray, the present tenant's father, got a lease of Flemington Mill for six years, from Whitsunday of that year. That farm had previously been let at £75. Now it was let at a yearly rent of £90, but no grassum was paid.

At Whitsunday 1788, the leases of Whiteside and Flemington were about to expire, while the lease of Fingland had still twelve years to run. In that situation James Murray proposed to the Duke to renounce the subsisting lease of Fingland, on getting a new lease of all the three farms. The

proposal was accepted, and he obtained a lease for fifty-seven years, from Whitsunday, at an annual rent of £260, 16s. 4d., which was the former rent of these farms, with the addition of the cess, bridge, and rogue money of each, and a grassum of £400 paid, as applicable to Whiteside and Fingland.

About twenty years after this lease, James Murray proposed to renounce it. And in place of it he obtained a lease of Flemington for himself, and a liferent lease of Fingland for his son James Murray, and a liferent lease of Whiteside for his son William Murray, each of those leases bearing to run from Whitsunday 1807.

The rent of Whiteside was £113, 12s.

It was alleged, therefore, on the part of the appellants, that there was here no diminution of the former rent, on the contrary, there was an augmentation to the amount of these public burdens, being somewhat more than £11. For this lease a grassum of £400 was paid, and which was declared to be solely in consideration of the farms of Whiteside and Fingland.

The Lord Ordinary and the Court pronounced the interlocutors which are set forth in the preceding appeal, setting aside the leases of Whiteside and Fingland.

Against these interlocutors, the appellants brought a separate appeal from that of the tenant.

Pleaded for the Appellants.—1st, The lease granted in consideration of a fine or grassum, does not fall under a prohibition to alienate contained in a strict entail. 2d, The rental of the farms of Whiteside and Fingland were not diminished by the grassums taken by the late Duke of Queensberry; therefore, the lease under reduction does not contravene the condition in the entail, that liferent leases shall always be set without evident diminution of the rental. 3d, Neither the Duke who granted, nor the tenant who accepted, the lease under reduction, were guilty of fraud against the succeeding heirs of entail by entering into that contract.

4th, It has been decided by a series of decisions, that a prohibition to alienate and to let in diminution of the rental, does not import a prohibition to let in consideration of a grassum.

5th, Grassums have been recognised by long practice, and by the law of the country, as perfectly legitimate in the circumstances of this case; and no Court ought to disregard that practice. If, therefore, grassums be not prohibited by the entail itself, or by the common law of the country; it is

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only by an implication that they can be brought under the prohibition to *alienate*, an implication that does violence to the strict rules of construction hitherto applicable to entails.

Pleaded for the Respondent.—1st, The question is, Whether the tack of Whiteside is or is not prohibited by the entail of Neidpath? As to this, two questions arise, and which the respondent begs leave to maintain, 1. That the lease is comprehended under the general prohibition of the entail; and, 2. That it is not comprehended under the exceptive or permissive clause of that entail.

1. He maintains that this lease is comprehended under the general prohibitions of the entail, because it was granted for a grassum. On this point of grassum, it would be superfluous to add to what the respondent has pleaded in the case of Harestanes, in which it is sufficiently shown that a lease with a grassum is prohibited by the general prohibition of the entail of Neidpath, both as an alienation of the future rents or profits of that estate, and as an alienation of the estate, *i.e.* a part of the right of property, or feudal right, constituting that estate.

Vide Harestanes' Appeal.

It may, however, be more particularly noticed, that there are just three forms of entail used in Scotland: 1st, Entails with clauses prohibiting alienation, &c., without any special mention of leases. 2d, Entails prohibiting alienations, and also specially prohibiting leases, unless of certain qualities. 3d, Entails prohibiting alienations, and excepting or permitting leases of certain qualities. In regard to the second sort, there is commonly no room for dispute respecting the meaning of the general clause, since it is explained by a special one. It may only be said that the special prohibition of leases is, in its own nature, clearly susceptible of being construed to be *exegetic*, and, in general, it is demonstrated to be exegetic by other undoubtedly exegetical clauses accompanying it. But it is very material to observe how the general prohibition must be, and has been, interpreted in the two other classes of entails.

In the first place, in respect to entails prohibiting alienations, but containing no special mention of leases, these are entails *in terminis* of the statute 1685. It may be contended that no others are authorised by that statute; but at any rate it is quite clear that the statute did not require any other, but authorised and designated these as good and effectual entails. And it has been shown that, if the prohibition of alienations in these entails includes leases, there is still a good,

equitable ground, for sustaining necessary administrative leases, so that this interpretation is subject to no difficulty whatever; but, on the other hand, if the prohibition of alienation does not include leases, it must follow that, under every entail of this class, leases may be let for *any annual rent, and any grassum.*

2. Is the lease, then, comprehended under the permissive clause? Here there is no room for argument upon the strict construction of entails, as has been advanced on the prohibitory clause. Construing the permissive clause by common, fair interpretation, it is clear that what the late Duke did was not permitted by this clause. It did not authorise him to take grassums. It did not authorise him to diminish the rental. On the contrary, there was an express condition that the leases so permitted should not be with diminution of the rental. Here there was a diminution of rental in respect of the grassums taken; and there was a diminution, also, in the actual amount, and therefore the lease of Whiteside was not granted under the power of the entail.

After hearing counsel upon this appeal, as also upon the answer of Francis Charteris, Earl of Wemyss, and due consideration being had of what was offered on either side in this cause, the Lords Spiritual and Temporal in Parliament assembled, find, That the said William, late Duke of Queensberry, had not power by the entail founded upon by the parties in this cause to grant tacks, partly for yearly rent, and partly for prices or sums of money paid to himself, and that tacks granted by him upon the surrender of former tacks, which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental; and it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.

For the Appellants, *Sir Saml. Romilly, Geo. Cranstoun, H. Brougham.*

For the Respondents, *John Leach, F. Jeffrey, J. H. Mackenzie.*

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THE DUKE OF BUCCLEUCH v. MONTGOMERY, &c.

[Queensberry Entail.]

HIS GRACE CHARLES WILLIAM, DUKE OF BUCCLEUCH AND QUEENSBERRY, . . . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq., Banker, London; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq., of the Society of the Inner Temple, Executors and Trust Disponees of the deceased William, Duke of Queensberry, ... } *Respondents.*

House of Lords, 12th July 1819.*

ENTAIL—PROHIBITORY CLAUSE—LEASING CLAUSE.—The Queensberry entail contained the prohibitory clause "to sell, wadset, or dispone." It also contained a permissive clause to grant leases, but not "for any longer space than for the setter's lifetime, or for "nineteen years, and that without diminution of the rental at "the least, for the just avail for the time." The Duke granted leases at the old rent, taking grassums instead of an increase of rent. Before these were expired he granted new leases, upon renunciations of the old, to endure for his life, *and* for nineteen years thereafter, granting at same time, an obligation to renew these annually, so that the tenant might have a lease for nineteen years, to run from the period of his death. Held, in the Court of Session, that the Duke had full powers to grant tacks in this manner. In the House of Lords this judgment was reversed.

In the year 1705, James, Duke of Queensberry executed an entail of the estate of Queensberry, in which there was the following prohibitive clause, "That it shall not be lawful "to the said Lord Charles Douglas, and the heirs male of his "body, nor to the other heirs of tailzie above mentioned, nor "any of them, to *sell*, *wadset*, or *dispone*, any of the foresaid "earldom, lands, baronies, offices, jurisdictions, patronages, "and others foresaid, nor any part of the same."

In the powers of this entail there was this clause in regard to making leases: "And that the said Lord Charles Douglas,

* The previous appeals under the Neidpath entail were decided by the First Division of the Court; this, and the appeal following were decided before the Second Division.

"nor the other heirs of tailzie above specified, shall not set "tacks nor rentals of the said lands for any longer space than "for the setter's lifetime, or for nineteen years, and that with- "out diminution of the rental, at the least for the just avail "for the time."

These prohibitions were fenced by irritant and resolutive clauses.

The late Duke William succeeded in 1778, and having no issue, nor the prospect of having any, he commenced thereafter a system of management of the entailed estate, in regard to granting leases of the same, which raised the present question.

He cut down the whole timber upon the estate, and allowed the noble Mansion House, erected by his predecessor, to go to ruin. In granting leases, instead of taking a fair tack-duty upon the expiration of a lease, as the consideration for granting a new one, his Grace thought fit to stipulate only for the old rent, taking in one sum the difference between that and the actual rent, which the land was worth, which, by the improvement of the land, and the progress of the country, in every case greatly exceeded the old rent. This, by whatever name it might be called, the appellant alleged, was a conversion of a part of the annual tack-duty, into a payment *ante manum*. The Duke, however, thought fit to term these payments *grassums*, with the view, it is supposed, of confounding them with the small payments of entry money, for which, at one period, his immediate predecessor, in letting the lands, had thought fit to stipulate.

In the year 1796, a system still more prejudicial was devised by his Grace, when seventy years of age, at a time of life when his possession of the Queensberry estates was about its close. At this time, a great number of farms upon the estate of Queensberry were let upon leases, the termination of which had not arrived, and in most of them a great many years of the leases were yet to run; others of the leases were expiring. In those cases, where the leases were current, and the termination was distant, the Duke's hopes of exercising the power of granting a new lease, and, of course, stipulating for a new payment *ante manum*, which he termed a grassum, were necessarily faint. To remove this obstacle to his wishes his Grace caused it to be intimated, that he would renew these for the period of nineteen years, upon payment of a sum of ready money. This was a transaction by which the rents of those years which were thus added to the original lease,

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were anticipated by the Duke. But as the leases which the Duke thus proposed to grant, were only to endure for nineteen years, his Grace could not expect to obtain so much of anticipated rents as if the leases should be granted for a longer period; and the entail prohibiting for longer than the "setter's lifetime, or for nineteen years," the plan was resorted to of interpreting this clause as if it gave power to grant leases for the "setter's lifetime, *and* for nineteen years," and making the Duke grant leases for nineteen years at the old rent, upon large sums being immediately paid to himself, the Duke granting an obligation to *renew these leases* annually, during his life, without any increase of rent. The appellant alleged that in this way the late Duke would, by this system of taking grassums, enrich his personal representatives, if the respondents succeeded in this action, to the amount of, at least, nearly half a million sterling.

Seeing that the appellant was adopting measures to reduce and set aside those leases, the respondents anticipated his measures by bringing an action of declarator to have it found and declared that the late Duke of Queensberry had full power to grant the said tacks, and was nowise limited from granting the same by any entail or entails of the said estate. All the existing leases were recited in this summons. The appellant brought also a reduction for reducing the whole leases. It was afterwards agreed that the question should be decided in the declarator.

To this action the following defences were given in by the appellant, "that the pretended leases are invalid, having "been granted by the late Duke, in contravention of the "provisions of the deed of entail; that, after entering on the "possession of the estate, he did not, as the leases gradually "expired, let the lands at the just avail for the time, but "granted leases for nineteen years, below the true value, "and in consideration of large grassums received, and after "having continued this system for a period of eighteen or "nineteen years, he thought fit, about the year 1796, when "the whole estate was under current leases, which had been "granted by himself, to form a new device, without waiting "for the expiry of these leases, of letting of new the whole "estate, both for his own lifetime and for nineteen years "after his decease, and also in diminution of the rental. In "pursuance of that device, his Grace had entered into trans-"actions with the tenants of the farms of the estate, by "which it was agreed that the latter, upon renouncing the

"leases which they then held, and for which they had already "paid large sums of money, should, upon payment of additional large sums to the Duke, obtain new leases for "nineteen years, at the same rent as that which was payable "at the period of the said Duke's succession to the estate "in the year 1778, or which was stipulated in their said "original leases, and without a regard being had to the "large sums of money which had been then paid his Grace, "he becoming bound at the same time to renew the said "leases annually, during the Duke's life, for the space of "nineteen years, from the time of said renewal, without any "increase in the amount of the rent being stipulated. In "conformity with this plan and obligation so granted, leases "were annually renewed during the whole period of the "Duke's life."

The Court (Second Division) finally pronounced this interlocutor in that action:—"Having advised the mutual March 6, 1816. "informations for the parties, with the writs produced, and "heard the counsel for the parties *viva voce*, repel the "defences, and find and decern and declare, in terms of the "original libel: Allow the executors of the late Duke of "Queensberry, to give in a minute of the facts stated by "their counsel at the bar, and the defender to answer it; "supersede extract till the first box-day."

Against this interlocutor the present appeal was brought by the appellant to the House of Lords.

Judgment of House of Lords in the first Appeal.

"After hearing counsel, on Friday the 21st, and Monday the 24th days of February last, upon the petition and appeal of Charles William, Duke of Buccleuch and Queensberry, complaining of an interlocutor of the Lords of Session in Scotland, of the Second Division, of the 7th, and signeted the 8th March 1816; and praying that the same might be reversed, varied, or amended, or that the appellant might have such other relief in the premises as to this House, in their Lordships' great wisdom, should seem meet. As also upon the answer of Sir James Montgomery, &c., trustees and executors. And consideration being had yesterday, and this day, of what was offered on either side, in this cause, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal; and in reviewing the same, the said Court is to have especial regard to the fact, that this action of declarator is brought by the executors

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and trust disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish unconditionally, all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner, and under the circumstances mentioned in the pleadings, and is not instituted by any persons to whom such tacks are granted, nor any such persons parties thereto. And it is further ordered, that the said Court do reconsider the defences of the said appellant, and especially, Whether in a question between such parties, the leases so granted, ought or ought not to be considered as granted in execution of such device as is alleged in the said defences; and if so granted, Whether the same ought to be considered as granted in fraud of the entail, and are, or are not such as ought on that account, or on any other account appearing in the pleadings to be held invalid, or not to be sustained at the instance of the pursuers as representing the Duke. And in reviewing the interlocutor complained of, the said Court do particularly also reconsider what is the legal effect of the word 'dispone,' contained in the deed of tailzie of the 26th December 1705, with reference to tacks of lands comprised in the said deed; and, further, do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases, and to all other the terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions, in reducing the amount of the clear rent receivable by the heir of tailzie, and to all the circumstances under which the appellant has alleged, and it shall appear, that the late Duke of Queensberry granted all such tacks. And it is further ordered, that the Court to which this remit is made, do require the opinions of the Judges of the other Division, in the matters and questions of law in this case in writing; which Judges of the other Division are so to give and communicate the same. And after so reviewing the said interlocutor complained of, the said Court do and decern in this case as may be just."

The cause having been remitted to the Second Division of the Court of Session, for reconsideration, their Lordships, upon a petition for the appellant, pronounced the following interlocutor:—"The Lords having considered this petition, "with the remit from the House of Lords, and whole pro-

"ceedings in this cause, in order to enable them to review "the interlocutor complained of, in terms of the said remit, "appoint the parties to put in mutual memorials, to be seen "and interchanged; and to furnish the Judges of both "Divisions of this Court, and also the Judges in the Outer "House, with printed copies thereof, and of the said remit; "and request of these Judges to consider the same, and to "give and communicate their opinion in writing on the "matters and questions of law arising out of this case, if "possible on or before the last day of the second week in the "ensuing Christmas recess, so as to enable this Division to "review the interlocutor complained of, and give judgment "as soon as may be after the meeting of the Court."

Memorials were, accordingly, given in; and the Judges of the First Division of the Court and of the Outer House gave and communicated their opinions in writing as directed by the said interlocutor.

On considering these memorials of the opinions of the Judges, the Lords of the Second Division pronounced this interlocutor:—"The Lords having resumed consideration "of this petition with the remit from the House of Lords "referred to, and advised the same, with the mutual "memorials for the parties, and opinions of the Judges "required by the interlocutor of the 12th day of November "last, with the alteration on the opinion of Lord Cringletie "given in by his Lordship, and heard the counsel for the "parties *viva voce*, repel the defences, and find, decern, and "declare, in terms of the original libel; allow the pursuers "to give in a minute of the facts stated by their counsel at "the bar, respecting the amount of grassums, and the "defender to answer it."* Feb. 5 and 10, 1818.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, There are some of the leases included in the summons of declarator, which are of endurance greater than nineteen years, which are stated to have been let under the Statute 10th Geo. III., of his present Majesty; but which are questioned by the appellant on special grounds, as being of endurance beyond nineteen years, and yet not let in due conformity to that statute, and which special objections have never been considered in this process of de-

* This was an adherence to their original interlocutor, although the First Division was against it.

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clarator; but in respect to which, on the contrary, the appellant prayed the Court to reserve consideration of these special objections; and the respondents declared, that "it was "open to the appellant to bring these leases under reduction "on that ground." Yet, the judgment of declarator pronounced by the Court, contains no reservation of these objections; and so does, in form, appear to apply even to these leases, and to establish their validity in all respects. In form, these leases ought to have been struck out of the libel, or a reservation ought to have been inserted by the Court. Before entering upon the discussion of questions applicable to the leases generally, this matter ought to be rectified.

2d, The question then is, in point of form, Can such a declarator of right in favour of the respondents be sustained? In this question, it is obvious, that all arguments or considerations drawn or attempted to be drawn from the right of, or favour to, the tenants, as pretended onerous third parties, are completely out of place. These will be considered in their own place. But, at present, the executors might completely fail in their action, although it might appear that, from the existence of pleas competent to *bona fide* onerous acquirers (not that any such are admitted to exist, but speaking hypothetically) it would not be in the power of the appellant to reduce one lease in a question with the tenants, or to remove a single tenant. In this question, there is no occasion at all to inquire how far the consequences of the operations of the late Duke may or may not have been to put it in the power of the tenants, or any of them, to maintain their possession against the appellant. However that may be, yet, if in these operations, the late Duke committed any wrong against the appellant, it is impossible that the interlocutor of the Court can stand in favour of the respondents.

The above is the only consideration which the appellant insists upon respecting the form of the action. He never said, that such an action of declarator was not competent, or that the respondents had not a sufficient title to pursue such a declarator in their own favour. He only contended and contends, that, being competent, it must be viewed in its true nature, and not treated as if it were a different action by other parties.

3d, The entail of the Queensberry estate, is a valid entail, and in legal form containing the usual prohibitions of a strict entail against disposition, or alienation in particular.

It is not denied by the respondents, that this entail con-

tains clauses prohibitory, irritant, and resolutive, and that it has been duly registered, and is in general in good form, and a valid and effectual entail. But they say, that it is narrower than entails prohibiting alienation; because though it prohibits to "*dispone*," yet it does not prohibit to "*alienate*." The appellant conceives that this criticism is wholly unfounded; and that a prohibition to *dispone* is equal to a prohibition to *alienate* in the language of Scotland, and of Scotch law. On this point, the appellant has already produced ample evidence in his former appeal case, which, as it remains entirely undisturbed by the respondents, it appears unnecessary to repeat. The respondents, unable to contradict this evidence, attempt to evade its force by an argument, that "The term *dispone* has two significations, the one strictly "forensic, the other also occasionally used in law writings, "and in general discourse by Scotchmen of the seventeenth "century. In its forensic sense, it signifies the transmission "of a right to any heritable subject, by that form of convey-"ance, termed a disposition. In its general or popular sense, "it is synonymous with the word dispose, and consequently "it is applied not only to all dispositions, strictly so called, "not only to all alienations, but to every act to which a sub-"ject is affected, either as a transmission, incumbrance, use, "or arrangement." And then the respondents proceed to argue, that the first of these meanings is to be taken, because entails are to be strictly interpreted, and because the other meaning is *too wide*, and would interfere with *the use* or management of the entailed estate.

But in reply to this, it is submitted that the evidence produced by the appellant does by no means go to any *extra forensic*, or merely popular meaning of the word dispone; but to its meaning in legal language, in the language of the legislature, and most particularly in the legal sense of prohibitions *to dispone;* nor does that evidence go to show that dispone has a legal meaning in such prohibitions of the vague kind stated by the respondents, but that it is equivalent to alienate, meaning any transmission of right, in whole or in part, out of the person prohibited. This, and nothing else but this, is the meaning of the term dispone, in such prohibitions as is established by the abundant evidence exhibited by the appellant. And if that be the case, it matters nothing, that in one or two instances it may have been used in a vague and popular sense, to designate, even use or arrangement. Alienate, is also used sometimes in a popular way, to signify things different.

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from what can be contemplated in prohibitions to alienate. But that is not enough to bring into doubt its legal meaning in such prohibitions. As to the alleged *forensic* meaning of dispone, the appellant is very much at a loss to know what the respondents say is that meaning. Erskine, in a loose way, says, that a disposition is a deed containing procuratory and precept. But Erskine, it is perfectly plain, is talking of the ordinary dispositions of land only, never dreaming of defining all the deeds that are contained under the term disposition. For it would be ridiculous to say, that all lands cannot be disponed without procuratory and precept. It is really absurd to say, that because, in point of fact, dispositions containing the fullest possible conveyance of the feudal property of lands, are the most common dispositions; and that dispositions of that sort, are very generally in view when the word disposition is used, *without any reference to its extent;* therefore, the meaning of the word is to be limited to this sort of dispositions, when it is used without a clear intention of its having its full extent, and applying to all dispositions as in a prohibition to dispone. In order to afford any argument to the respondents, they should show, that in forensic or rather legal language, a *prohibition to dispone* was understood to mean only a prohibition to grant any particular form of deed, or in any sense narrower than a prohibition to alienate. But that has not been, and cannot be done. It is vain, therefore, to say that the prohibition to dispone in an entail, ought to be taken in its narrowest sense. Such a prohibition has no sense but one, which is that of prohibiting *all dispositions, i.e.,* deeds of an alienative nature. The respondents have referred to the Duntreath case, as an instance in which a narrow technical meaning was taken, though a popular meaning existed, which was only the meaning of the entailer. But in that case there was no sufficient evidence of any such popular meaning, far less of a *legal* meaning in which the entailer had used the word. If there had, in that case, been produced dozens of passages in the chief books of law, in decisions, and most of all, in statutes, in which the word *heirs* expressed the institute, there never would have been an idea of such a determination of that case as did take place. It is hardly necessary to notice again the argument, that a prohibition to dispone, prohibits nothing but deeds by the party prohibited, in which he *uses the word dispone.* The argument was formerly used in reference to the word alienate; and was, it is believed, thought frivolous.

It is not anywise better in relation to *dispone*. It is plain, that a prohibition to dispone is a prohibition to do *the thing disponing*, not merely to use the word dispone, just as every other prohibition of the kind is a prohibition to do the thing signified by the word. On this point, therefore, there can be little difficulty; nor is it necessary to go further into argument. There can, it is thought, be no doubt, that the entail of Queensberry is nowise incomplete, but contains as broad, and as effectual a prohibition, as if the word alienate had been used.

The above considerations derive additional force from the particular expressions in the entail of Queensberry, wherein, at the end of the clause prohibiting to dispone to contract debt, or to alter the succession, there is added the words, "*any manner of way whatsoever.*" And, in the irritant clause, the irritancy is provided in case the heirs of entail shall contravene the conditions or provisions in "any manner of way;" the expression, in both cases, shewing that the entailer was anxious to use the words in the broadest sense, and by no means in a sense limited to any particular form or style of conveyance.

There is no dispute, that this entail contains complete prohibitions against contracting debt and altering the succession, particularly the former.

4th, There is added in this entail a special prohibition of tacks let for "any longer space than the setter's lifetime, or "nineteen years, and that without diminution of the rental, "at the least, at the just avail for the time."

5th, There is further added, in this entail, a special prohibition of all deeds "in any sort," whereby the tailzied lands and estate, or any part thereof, "may be affected," directly or indirectly. Which prohibition is, by the use of the words "in any sort," and "directly or indirectly," expressly provided to be of as wide and comprehensive signification as the words can admit.

6th, Such being the nature of the entail, the leases libelled were granted by the Duke of Queensberry, in direct contravention of the general prohibitions of the entail, in respect they were granted, not for annual-rent payable to the heir of entail having right to the land, at the time the use and fruits of it were to be taken by the tenant, but in great part, for a price or anticipated rent, under the name of *grassum*, paid to the granter, who was not to have right to the land at the time the use and profits of the land were taken by the tenant.

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Being so granted, the leases libelled are prohibited in one of two ways, either as contracts or as dispositions or alienations.

The first has been suggested, and, indeed, forced upon the appellant by the respondents themselves, who have strongly contended that *leases are not real rights.*

Now, if this be well founded, it follows, that leases, not being real rights, but merely personal rights, or *jura crediti*, binding singular successors indeed *vi statuti*, but binding the heir of the granter by representation, just as if the statute had never existed, *i.e.* by way of personal obligation *ex contractu*, then undoubtedly, all leases are *in terminis* prohibited by the prohibition to contract debt in the entail. For, it never has been disputed, this prohibition in entails absolutely excludes all personal obligations whatever, contracted by any heir of entail from affecting his successors (except in so far as it is qualified by express exceptions). And, in particular, it is contended by the respondents themselves, that an obligation to grant a tack is not effectual against an heir of entail; and he cites the case of Ker of Chatto to prove the point. This demonstrates, that the words of the prohibition to contract debt, are broad enough to exclude obligations of lease, as well as any others, provided they be truly personal obligations. The heir of entail being prohibited to contract any debts or obligations, can never bind his successors by any such; and, if leases be reducible into that class, there can be no doubt, that by the express words of the prohibition, the heir of a strict entail is prohibited to grant any.

Vide ante, vol. iii., p. 309.

The second view is, that the leases are not personal rights, but real, which the appellant understood to be the view taken by the Court of Session and House of Lords, in the cases of long leases upon entailed estates, and which the appellant, therefore, was willing to take in this case. In this view, it is unquestionable, that the lease is constituted by imparting to the tenant a share of the right of property, for no real right can possibly be constituted any other way. It is a real right to keep possession of the land, and to use and take the fruits of it for a certain time. Now, in this view, leases must fall under the prohibition of *alienation* or *disposition*, because all grants of any part of the right of property must fall under such a prohibition. In such a prohibition, the word has always been used to express any conveyance of any part of the corporeal subject, or of the right thereto.

In a prohibition of alienation or disposition, the obvious

meaning is to designate every thing, more or less, which is at all of the nature of the alienation, whether it relates to the whole or a part of the corporeal subject, or of the right. The obvious intention is to preserve the subject and right entire, not merely to prevent it from being conveyed entirely. It is plain, that if the sense of alienate or dispone in any prohibition were otherwise, it would be absurd. For it would leave it perfectly open to the person prohibited, to defeat the prohibition at pleasure, by alienating any part of the subject or right, however great, and leaving only any part, however small.

According to the civil law, it appears, that a prohibition of alienation applied to all transmissions of any part of the real right, *vide* the title of the code *De Rebus alienis non alienandis*, where a rescript of Justinian shows this.

In the law of Scotland, there can be no doubt, that prohibitions of disposition or alienation have in Scotland always and universally been regarded as sufficient to prohibit any transmission of the right of property in whole or in part, by granting real rights out of it. Thus, to pass over entails and leases at present, alienation of land is prohibited in Scotland by persons on deathbed; where the land is annexed to the Crown; where it belongs to persons who are *oberati*, or to persons inhibited or interdicted. In none of these cases was it ever held competent to grant real rights out of the property, materially diminishing it.

It is said, in answer to this, that these persons are not merely prohibited to alienate; but also to "affect or burden their heritage." This is a dangerous argument for the respondents in the present case, where the heirs of entail are prohibited to do "any deed in any sort," whereby the land may be affected directly or indirectly. But to pass over that, the answer of the respondents appears to be erroneous.

In judging whether any conveyance is an alienation, the transference of the right *to the thing* in whole or in part is looked to, not the transference of right or obligation, in relation to the superior, or any other person. Indeed, it has been proved that, in Scotch law, the grant of any real right was distinctly called disposition. Lord Stair, it was shewn throughout, bestowed that appellation on transmission of any real right, by transmission of part of the right of property. And the Scotch statutes use the same phraseology.

Such being the case in general, why should not such prohibitions apply to leases as to other real rights? Leases are

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real, and they convey out of the granter for a time, which may be very long, almost the whole right of property. They transfer to the tenant the right of property in the fruits, before they are separated from the solum, and while still part of the landed right; and, in some cases, as in leases of mines, quarries, coal-pits, &c., they give him a right to take away, as his own property, part of the *solum* itself. Of all grants of real right out of the property, leases seem to be most plainly alienations.

7th, A great many of the leases in question, were granted for a term of endurance prohibited by the provisions of the tailzie. The special clause respecting tack, prohibited the heirs from setting tacks or rentals "of the said lands for "any longer space than the setter's lifetime, *or* for nineteen "years." This prohibition obviously extended to tacks, in whatever form constituted, by which a right of lease for a longer term than that specified, might be constituted. In short, it did not apply to one form of instrument more than another; but it obviously meant, a specific term of endurance, not exceeding nineteen years.

In like manner, an obligation followed by possession to grant a tack which should endure for the life of the granter, and for nineteen years after the term immediately preceding his death, equally fell under the prohibition, because it is *triti juris*, that an obligation to grant a lease, followed by possession, constitutes a right of lease; on this point, it is sufficient to refer to the opinion of Lord Stair, B. ii., tit. 9, § 6. The Duke, in order to make these leases extend to both these periods, that is, to his *own liferent*, and for nineteen years, granted the obligation to renew these leases for nineteen years annually. The grassums were paid as applicable to leases to endure for his own life, and nineteen years after his death, and, therefore, they were granted for a longer period than nineteen years, or the Duke's lifetime.

8th, Laying aside, at present, the effect of the obligation to renew, as itself constituting in each case a right of lease, and looking only to the special grants of leases for nineteen years, as the only rights of lease affecting the lands at the death of the Duke, the tacks so let, were not let without diminution of the rental, 'at the least, at the just avail for the time.' In the first place, it must be admitted, that those tacks which do not even pretend to reserve any more than the old rent, a rent confessedly quite inadequate, were certainly not let "at the least, at the just avail for the time." But it

is said, that they were let without diminution of the rental, and that this is sufficient, though they be not let at the just avail for the time. These words, "without diminution of "the rental," have been argued to admit of two meanings,— 1st, Without taking less than the rent, by the lease to expire. 2d, Without making the rental or value of the estate less by the tack, than it would have been without it. The latter is certainly the most literal, as well as the most reasonable meaning; and whatever may be said as to the possibility of adopting the former, it certainly is impossible to deny that the latter may be the meaning. Now, if that meaning be in itself probable, it appears clear that it must be adopted, when the words "at the least, for the just avail for the time," are added. For these words explain the meaning of the words, "without diminution of the rental." Shewing that, if a fair rent for the time is taken, then the rental will not be held diminished. This appears the most consistent and rational explanation of the clause. The antecedency of an uncertain quantity, has no necessary effect in taking away the proper meaning of the words, "at the least," as expressive of something, than which nothing should be less. This appears in the definition cited by the respondents themselves, from Dr Johnson, "At the lowest degree." It is provided at the lowest degree, the just avail for the time shall be taken. Under such a provision then, can it be said, that something is to be taken lower than the lowest? In poetry, there may be found, in the lowest deep, a lower deep; but this cannot well be done in reality.

9th, The Duke, while he took these grassums, neglected to relieve the rent, which he reserved to the heirs of entail from the legal burdens payable on account of these grassums, thereby directly imposing these burdens upon this reserved rent, and so diminishing the rental.

Pleaded for the Respondents.—1st, The present action of declarator is a competent form of process for trying the validity of the leases granted by the late Duke of Queensberry, on the Queensberry estate. The respondents have a sufficient interest to entitle them to use this process; and, it is not necessary that the tenants should be parties to it. And from the nature of the conclusions, and the interest which entitles the respondents to insist in this action, they must have right to use every argument in support of the leases which may be competent to the tenants as third parties, onerously contracting.

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2d, There can be no fraud against an entail, independent of, or as distinguished from, the infringement of any express prohibition; and, therefore, unless it can be shown that the leases granted by the late Duke of Queensberry, are expressly prohibited by the entail, he must have possessed the legal power to grant them. It has been an established maxim ever since deeds of entail were known in Scotland, that they are *strictissimi juris*, an expression which imports that all the conditions and restrictions which they impose on the heir in possession, are to be interpreted, so as to impose no greater restraint than the words used clearly and necessarily express; and that where these are in any respect ambiguous, that meaning must be adopted which is most favourable to liberty. The intention to impose restrictions and limitations, is not to be gathered, by inference or implication, from other parts of the deed, and, however apparent, it is of no avail, unless it is expressed in clear, proper, precise, and unambiguous terms. Lord Braxfield laid it down in the Duntreath case, in regard to the terms of prohibitory clauses in entails, thus: —"He who means to limit his heirs, must do it in such "explicit, apt, and proper terms, that no man who reads can "doubt. In questions of this kind, parties are not left at "liberty to argue from intention. If that intention is not "expressed in clear and unambiguous terms, it can have no "effect. *All acts, however inconsistent with the general pur-* "*pose of the settlement, or contrary to the clear intention of the* "*entailer*, not expressly and in legal technical language pro- "hibited, are within the power of an heir of entail, as well "as effectual against the estate. No aid whatever can be "drawn from other points of the deed, from its general scope "and purpose, or from the intention of the maker, however "clearly to be gathered from the deed."

To these authorities, the respondents might add, if it were necessary, the opinions of every eminent lawyer or judge, down to the present time; and they might cite decisions without number, all proceeding on, and governed by, this rule.

But, if it is the rule of law, that entails are to be strictly interpreted, and that fetters are not to be reared up by inference and implication, it appears to the respondents to be a necessary consequence, that there can be no fraud, unless where an express prohibition is infringed. In this case there is no express prohibition against granting leases, nor is there any express prohibition against taking grassums; yet, if the

appellant's argument is to prevail, these prohibitions are to be implied, that is, they are to be inferred from the prohibition to dispone, and thus, prohibitions in violation of the strict rule of interpretation, are to be reared up by implication.

The appellant has referred to instances of implied prohibition. But, it is not in consequence of an implied prohibition, that the heir of entail cannot sell wood to be cut after his death, because the reason of this is founded on a totally different principle. Until the wood is cut, the contract remains a mere personal obligation on the seller. The trees, while they remain growing, are *pars soli*, and as such, become the property of the succeeding heir, the moment his predecessor dies; and as he is in no way liable for the personal obligations of his predecessor, he is not obliged to suffer his property to be touched. The true criterion by which to judge of the principle on which such cases rest, is to suppose that an unlimited proprietor had, after making such a contract, transferred the estate by sale, without taking the purchaser bound to fulfil the contract. The moment the purchaser took infeftment in the lands, the whole growing wood became his property; and having nothing to do with the contract, he could not have been called on to fulfil it.

3d, But the late Duke did not, by the leases which he granted, contravene the prohibitions contained in the leasing clause of the entail. The heir of entail is allowed to let leases for his own lifetime for any period not exceeding nineteen years; of course, every lease for the exact space of nineteen years, is, where not objectionable on other grounds, within the powers of the heir, and cannot import a contravention. But, with the exception of a few building leases for ninety-nine years, the whole leases on the estate, and the whole of those to which the declarator has a reference, are for a period of nineteen years, and nothing more. And, though there was an obligation to renew these annually, yet these obligations regard only a lease for nineteen years and nothing more, so that these leases are not in fraud of the entail, in so far as their endurance is concerned.

Then, again, in regard to that part of the leasing clause which has reference to the rent or rental, the entail directs that the leases should be granted "*without diminution of the* "*rental*, at the least, at the just avail for the time," the meaning which the respondents have affixed to these words, and which a great majority of the Judges of the Court of Session

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have concurred in, thinking the only rational and just meaning is, that the farm shall be let, not under the last rent, but if that rent cannot be obtained, then they shall be let at the just avail for the time, that is, the rent shall be lowered as little as possible below the last rent.

It has been alleged by the appellant, that in all the leases in question, there has been an actual diminution of the rental, because, under the previous leases, the late Duke drew not only the annual rent, but a grassum besides, and in fixing the present rent, no allowance or increase was made on account of the grassum. In support of this view of the matter, reference is also made to the practice in valuations of teinds, where grassums are taken into account as well as rents.

In answer to this argument, the respondents may, in the first place, observe, that it proceeds on the assumption that grassum is rent, and of course that it is an anticipation of a part of the rent, made at the commencement of the lease. But, were this proposition even made out, it would not follow that the leases could be set aside. There is no prohibition or irritancy in the entail, directed against an anticipation of rent; such an anticipation, therefore, imports no contravention. It is not, indeed, effectual against the succeeding heir; but this arises, as has been shown, not from its being forbidden, but because the tenant has no right to the benefit of the statute 1449, without paying his full rent. The only consequence, therefore, of such an anticipation would be, that the tenant would be obliged to pay over again to the appellant such part of the anticipated rent as corresponds to the period since the late Duke's death, or, in other words, that the respondents would be obliged to pay the appellant such a proportion of each grassum, as corresponds to the period of the lease which remained to run at the time of his succession.

But, in the second place, there is no ground for saying that a grassum is anticipated rent. The two things are plainly and essentially different. Rent is an annual payment to be made by the tenant during his possession; grassum is the price or consideration given for a beneficial lease.

4th, The general prohibition to *dispone*, can have no reference to leases, and, therefore, it follows, that it is quite immaterial to inquire whether the word "*dispone*" be equivalent to the word "*alienate*," because, supposing the special clause here in dispute had not existed, the respondents conceive that it is easy to prove that a lease of ordinary duration,

whether let for a grassum or not, would not have been struck at by the general prohibition. Such an inquiry, it is humbly conceived, would not have been necessary, had not the appellant, among other arguments, maintained this extraordinary proposition, that a lease of any endurance, whether with a grassum or not, is an alienation, and, consequently, that every entailed proprietor in Scotland, is in the constant practice of contravening. But, the respondents maintain, 1st, That leases of ordinary duration are not alienations; 2d, That the taking a grassum does not convert a lease into an *alienation;* and 3d, that even supposing that to grant a lease is to *alienate*, it is not to *dispone*, these terms not being synonymous, according to the construction applicable to entails.

1st, That leases of ordinary endurance were ever accounted alienations, is an assumption made in direct contradiction to every authority in the law.

The whole series of texts brought forward in the Wakefield case, to prove that a long lease is an alienation or *quasi* alienation, prove by necessary implication that a lease of ordinary endurance is not so. When Balfour says, "a grant "of lands for certain years, and until a loan be paid, is no- "wise to be understood a tack and assedation, but rather a "kind and sort of alienation;" it follows, that he considered a tack or lease in the general case to be something different from an alienation. Sir Thomas Craig repeats the same observation:—"Non autem est assedatio, se ad certos annos "locatio fit, quibus finitis, duratura semper donec pecunia, "quam fortasse dominus, a colono mutuam acceperat repen- "datur; sed species quædam alienationis." He afterwards adds:—"Qui alienare in jure prohibentur, neque ad novem "decim annos neque pro vita assedare queant." It is impossible to make a more marked distinction betwixt an alienation and a lease of ordinary endurance.

P. 201.

P. 279.

Mackenzie observes, that "possession is the same thing "to tacks, that seisins are to alienations," an absolute solecism if all tacks are alienations. Lord Stair expressly says, that "tacks in the ordinary extent thereof, are not alienations." The same thing is repeated by all later authors. In the Wakefield case, President Campbell observed:—"My opinion "is just that of all your Lordships. All of us know, 1st, "That a *lease may be granted by an heir*, which is no alien- "ation; and, 2d, That a lease may be granted, which is "really, substantially, and truly an alienation. Now, it is

Obs. on Stat. 1449, l. 15. (1st Ed. 1698.)

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" unnecessary for me to bring under your Lordships' view, " examples of the two extremes, because they must be " obvious; for leases of one year or two years, or in Craig's " time, for ten years, or in the present day for nineteen years, " are not alienations."

The appellant's doctrine, therefore, is not only contradicted by every authority, but absurd in itself. If every lease were an alienation, then no heir of entail could derive any rent from letting the farms on the estate, and he would be left to farm the whole estate himself, or to let it from year to year, at little better than an elusory rent.

2d, But if a lease is not an alienation in itself, a grassum can never make it one. The tenant who pays a grassum does not obtain a right of a higher description, more real in its nature, or more ample in its effects, than the tenant who pays a rack rent. He gives, in return, no doubt, a different consideration; but the question, alienation or not? depends on the nature of the right transferred, not on the cause of transference.

3d, But, even if it were proved that to let a grassum lease is to alienate, it will not follow that it falls under the prohibition to *dispone*, because to *dispone* and to *alienate* are not synonymous.

It has been mentioned, that long leases, or leases of such endurance as to approach to emphyteutic contracts, have been termed alienations by all our writers. They have been considered as rights of ownership, and, therefore, a word expressive of a grant of ownership, has been applied to their constitution.

The term "*dispone*" has two significations; the one strictly technical, the other used occasionally in law writings and in general discourse by Scotchmen of the seventeenth century. In its strict technical sense, it signifies the transmission of a right to an heritable subject to that form of conveyance, termed a disposition, and in which the granter makes use of the word "dispone," in conveying the right. In its general and popular sense, it is synonymous with the English word *dispose;* and is consequently applied, not only to all dispositions, strictly so called—not only to all alienations—but to every act by which a subject is affected, either as to transmission, incumbrance, use, or arrangement. The appellant has, with great labour and research, collected together a mass of authority, to prove that *dispone* is the same with dispose of, and disposition the same as disposal. But it goes

no way to solve the question, as it still remains to be considered in which of these two acceptations, the popular or the technical, the word must be taken in construing a Scotch entail.

The interpretation which the Court of Session has put on the prohibitory clause of this entail, is proved to be correct, by the practice and understanding of the country for centuries back, in cases where lands have been possessed under a prohibition to alienate or to diminish the rental. It is proved to be correct by the practice in the present entail for fifty years after it was made, by the universal practice of other entails, containing similar prohibitions, and by various decisions of the Supreme Court.

Journals of the House of Lords.

After hearing counsel upon the appeal of Charles William, Duke of Buccleuch and Queensberry, which was brought into this House on the 17th February 1818, and which has since been revived in the name of Walter Francis, now Duke of Buccleuch and Queensberry, and in the name of Henry James, Lord Montagu, and the Honourable Charles Douglas, as his tutors, complaining of an interlocutor of the Lords of Session in Scotland, of the Second Division of the 5th, and signed the 10th of February 1818, and praying that the same might be reversed, varied, or amended. As also upon the answer of Sir James Montgomery and others. And consideration being had on what was offered on either side in this cause: It is ordered and adjudged by the Lords, that the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, that William, late Duke of Queensberry, had not power, by the entail founded on by the parties in this cause, to grant tacks for terms of years, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon surrender of former tacks which had been granted, partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are, therefore, to be considered as between the persons claiming under the entail, as tacks which he had not power to grant by such entail. And it is further ordered, that with this

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finding the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

For the Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, Geo. Cranstoun, Alex. Irving.*

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THE DUKE OF BUCCLEUCH AND QUEENSBERRY, ... *Appellant;*

JOHN HYSLOP, Tenant in Halscar, . . *Respondent.*

House of Lords, 12th July 1819.

[Halscar.]

ENTAIL—PROHIBITORY CLAUSE—PERMISSIVE CLAUSE TO GRANT LEASES—CONTRAVENTION—ACT 1449, C. 17.—A reduction was brought by the appellant, to set aside a lease granted by the late Duke of Queensberry, on the ground that it was granted in contravention of the prohibitions in the said entail; that it was granted for the whole period of the Duke's life, *and* for nineteen years after his death, and, consequently, for a longer period than was permitted by the entail; that the farm was not let at the just avail at the time; and that it was let with diminution of the rental. The tenant contended that he had entered into possession, and put out large sums on the faith of the lease, and that the same was entered into on his part in *bona fide*, and the action against him was, therefore, irrelevant, his lease being protected by the Act 1449, c. 17. The Court of Session sustained the defences, and assoilzied the tenant. In the House of Lords this judgment was reversed.

This was an action of reduction raised by the Duke of Buccleuch and Queensberry, against one of the tenants in the leases granted by the late Duke of Queensberry, as fully detailed in the previous appeal. He had been all his lifetime on the farm. In the year 1786, he had obtained a lease for nineteen years, of the farm of Halscar, for a rent of £30 per annum, and a grassum of £36. In the year 1797, this lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. In 1803 he procured a lease of the same farm for nineteen years, at the yearly rent of £30, the old lease then being unexpired; and, besides, there

was granted an obligation by the Duke to renew this last lease to the respondent annually, for the same period of nineteen years.

The action of reduction was brought by the appellant to set aside the last mentioned lease, as null and void, and as having been granted in contravention of the conditions contained in the entail (quoted in the preceding appeal), the said lease being, in fact, granted both for the whole period of the Duke's life, *and* for nineteen years after his decease, and, consequently, for a longer period than was allowed by the said entail; also that the farm was *not let at the just avail* at the time; as, instead of £30 per annum, it would, if let at the just avail at the date of the lease, have let at £130 yearly; and that, besides, the farm was let with *diminution of the rental.*

The respondent stated, in regard to the lease 1803, that no grassum was paid; and whatever question there might arise between the executors upon the Duke's powers under the entail, he, the tenant, could not be affected by that question. He had no concern with the Duke's management or mismanagement of his estate, nor was he privy to any of his contraventions, or alleged frauds. Under his lease he acquired possession, put out large sums on the faith of it, and the only question here was, Whether the real right which he possessed under a contract strictly onerous, could be reduced as not within the powers of the entail. He concluded that, as against him, the action was irrelevant.

The Lord Ordinary made avizandum to the Court with this and the other action. The Court, of this date, pronounced this interlocutor: "The Lords having advised the mutual "informations for the parties, with the writs produced, and "heard the counsel for the parties, *viva voce*, sustain the "defences, assoilzies the defender, and decern; find the de- "fender entitled to his necessary expenses, and allow an "account thereof to be given in." Mar. 7, 1816.

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel, on Monday the 24th day of February last, upon this appeal, complaining of an interlocutor of the Lords of Session of the Second Division, of 7th, and signed the 8th of March 1816. And consideration being had yesterday and this day, of what was offered on either side in this cause, it is ordered by the Lords Spiritual July 10, 1817. Judgment of House of Lords in first appeal.

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finding the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

For the Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, Geo. Cranstoun, Alex. Irving.*

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THE DUKE OF BUCCLEUCH v. HYSLOP.

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House of Lords, 12th July 1819.

[Halscar.]

ENTAIL—PROHIBITORY CLAUSE—PERMISSIVE CLAUSE TO GRANT LEASES—CONTRAVENTION—ACT 1449, c. 17.—A reduction was brought by the appellant, to set aside a lease granted by the late Duke of Queensberry, on the ground that it was granted in contravention of the prohibitions in the said entail; that it was granted for the whole period of the Duke's life, *and* for nineteen years after his death, and, consequently, for a longer period than was permitted by the entail; that the farm was not let at the just avail at the time; and that it was let with diminution of the rental. The tenant contended that he had entered into possession, and put out large sums on the faith of the lease, and that the same was entered into on his part in *bona fide*, and the action against him was, therefore, irrelevant, his lease being protected by the Act 1449, c. 17. The Court of Session sustained the defences, and assoilzied the tenant. In the House of Lords this judgment was reversed.

This was an action of reduction raised by the Duke of Buccleuch and Queensberry, against one of the tenants in the leases granted by the late Duke of Queensberry, as fully detailed in the previous appeal. He had been all his lifetime on the farm. In the year 1786, he had obtained a lease for nineteen years, of the farm of Halscar, for a rent of £30 per annum, and a grassum of £36. In the year 1797, this lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. In 1803 he procured a lease of the same farm for nineteen years, at the yearly rent of £30, the old lease then being unexpired; and, besides, there

was granted an obligation by the Duke to renew this last lease to the respondent annually, for the same period of nineteen years.

The action of reduction was brought by the appellant to set aside the last mentioned lease, as null and void, and as having been granted in contravention of the conditions contained in the entail (quoted in the preceding appeal), the said lease being, in fact, granted both for the whole period of the Duke's life, *and* for nineteen years after his decease, and, consequently, for a longer period than was allowed by the said entail; also that the farm was *not let at the just avail* at the time; as, instead of £30 per annum, it would, if let at the just avail at the date of the lease, have let at £130 yearly; and that, besides, the farm was let with *diminution of the rental.*

The respondent stated, in regard to the lease 1803, that no grassum was paid; and whatever question there might arise between the executors upon the Duke's powers under the entail, he, the tenant, could not be affected by that question. He had no concern with the Duke's management or mismanagement of his estate, nor was he privy to any of his contraventions, or alleged frauds. Under his lease he acquired possession, put out large sums on the faith of it, and the only question here was, Whether the real right which he possessed under a contract strictly onerous, could be reduced as not within the powers of the entail. He concluded that, as against him, the action was irrelevant.

The Lord Ordinary made avizandum to the Court with this and the other action. The Court, of this date, pronounced this interlocutor: "The Lords having advised the mutual "informations for the parties, with the writs produced, and "heard the counsel for the parties, *viva voce*, sustain the "defences, assoilzies the defender, and decern; find the de- "fender entitled to his necessary expenses, and allow an "account thereof to be given in."

Mar. 7, 1816.

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel, on Monday the 24th day of February last, upon this appeal, complaining of an interlocutor of the Lords of Session of the Second Division, of 7th, and signed the 8th of March 1816. And consideration being had yesterday and this day, of what was offered on either side in this cause, it is ordered by the Lords Spiritual

July 10, 1817. Judgment of House of Lords in first appeal.

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and Temporal, in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack to which the cause relates, ought to be reduced, in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of, in the cause between the Duke of Buccleuch and Sir James Montgomery and Others, executors and trust-disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court, in the said cause, of even date herewith: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do, and decern in this cause as may be just.

The cause having thus returned to the Lords of Session of the Second Division, their Lordships appointed memorials to be prepared, printed and boxed, to the Judges of both Divisions of this Court, and also the Judges of the Outer House, for their opinions. And when this was done, on considering the memorials for the parties, with these opinions, the Lords of the Second Division pronounced the following interlocutor:

Feb. 5, 1818. "The Lords having resumed consideration of the petition for "the Duke of Buccleuch, with the remit from the House of "Lords referred to, and advised the same, with the mutual "memorials for the parties, and opinions of the Judges re- "quired by the interlocutor of the 12th day of November "last, with the alteration on the opinion of Lord Cringletie, "given in by his Lordship, and heard the counsel for the "parties *viva voce;* and having reviewed generally the inter- "locutor complained of, in another appeal, in the cause be- "tween the Duke of Buccleuch and Sir James Montgomery, "and others, executors and trust-disponees of the late Duke "of Queensberry, deceased; sustain the defences, assoilzie "the defender, and decern; allow the pursuer to give in a "minute of what was stated by his counsel at the bar, with "regard to what had been mentioned in the memorial for the "defender, respecting the rental of the estate of Queensberry,

"and the defender to answer it; find the defender entitled to "his necessary expenses, and allow an account thereof to be "given in."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.**—1st, By the prohibitions against selling, disponing, and affecting or burdening the estate, the late Duke of Queensberry was disabled from granting leases, not let in the ordinary administration of the estate, nor for annual rents, payable to the heir substitute, having right to the lands at the time the uses and fruits of them were to be taken by the tenants; but which were granted in great part for the anticipated rents, under the name of grassums, paid to his Grace himself, who was not to have right to the estate, when the uses and fruits of it were to be so taken. Among the vast number of leases constituted in this manner, contrary to the prohibitions of the tailzie, was the lease in question, to the respondent. The respondent, in the year 1786, obtained a lease for nineteen years of this farm, for an annual rent of £30, and a grassum of £36. In the year 1797, that lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. It was, therefore, prohibited by the terms of the entail, and rendered void by the provisions of that deed.

2d, The late Duke of Queensberry was prohibited from granting leases of a longer duration, than either for his own life, *or* for nineteen years; but the lease in question having been constituted by an obligation to grant a lease for nineteen years, and to renew the same annually for the same space, each year of the Duke's life; and that obligation being followed by possession, was, by the law of Scotland, a lease for the Duke's life, *and* for nineteen years after his death; that is, it was, in fact, a lease for thirty-two years. It is, therefore, void by the provisions of the entail.

3d, This lease was let in diminution of the rental. For, 1. The rent reserved under it, and available to the heirs of entail, was no more than the annual rent stipulated in the preceding lease; nothing was reserved under it in consideration of that part of the return paid under the lease in name of grassum. There was, therefore, in that respect, a diminution of the rental. But, 2. It was let with diminution of the rental, because the public burdens were imposed upon the

* This is the argument in the first appeal.

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they are acts effectually prohibited by the entail, and he may challenge a lease on such grounds. But, when the act of which he complains, is an act on which a real right has been constituted in favour of a third party contracting onerously, the question, whether that act has been effectually prohibited, or rather, whether the power of the heir of entail, as *proprietor* to do it, has been effectually taken away, is materially different from a similar question which may arise where there is no third party holding a real right, and the question is with the granter, and his representatives on his right to do, or his obligation not to do the thing objected to? This is a distinction obvious in principle, and which is expressly recognised by the Statute 1685, c. 22, under which alone any entail can be made, which will be effectual against third parties, creditors, and purchasers. In a question among heirs or between heirs, and the gratuitous donees of an heir in possession, a mere prohibitory clause in the titles of the estate, is sufficient to prevent any deeds contrary to the prohibition, and the less encumbered the entail is with clauses of irritancy and forefeiture, its effect will be the more ample, or the less strict in favour of the substitute heirs. But, on the other hand, it is quite clear, that such an entail is of no effect at all against third parties. At present, the respondent may content himself with stating the undoubted law, that unless the prohibitory clause is fortified, both with an irritant clause, declaring deeds in contravention to be null, and with a resolutive clause, declaring the right of the contravener in the whole estate to be forfeited, and unless the entail is recorded in the register of tailzies, and the whole clauses engrossed in the investiture, it cannot militate against creditors or purchasers.

But the consequence of this manifestly is, that the appellant, in challenging this lease, must found his title on the Statute 1685, and must make out that by the Act complained of, the late Duke of Queensberry forfeited his right to the whole estate under the resolutive clause, and through that *forfeiture*, the real right of the third party, the tenant, is a nullity under the irritant clause. It is apparent, therefore, that attending to the nature of the respondent's title by his lease, the question, whether the Duke of Queensberry had power to grant it effectually or not, is a question essentially different from any question concerning the personal obligations of the Duke of Queensberry, or his representatives, to the heirs of entail. The respondent does not represent the

Duke of Queensberry; he is not liable for his acts and deeds; he is not responsible for his views and intentions; he is not accountable for his disposal of any price which he may have taken for a right given. He has no concern with his general management of his estate, and his designs or his prudence in regard to the advantage of the future heirs, can have no effect whatever on the rights of the respondent. The single point in which the respondent is interested, is whether the act of granting this lease is, in *express* words, prohibited under pain of irritancy and forfeiture or not. If it is not, it is nothing to the respondent, what else the Duke of Queensberry may have done, or intended, or what obligations he or his representatives may have incurred to the heirs of entail.

After hearing counsel upon this appeal, as also upon the answer of John Hyslop, tenant in Halscar, put into the said appeal; and due consideration being had of what was offered on either side of the cause: It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled; that the said interlocutor complained of in the said appeal be, and the same is hereby reversed; and the Lords find, That the late Duke of Queensberry had not power by the deed of entail founded upon by the parties in this cause, to grant the tack in question in this cause, the same having been granted upon the surrender or renunciation of a former tack unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and the said tack in question, therefore, having been granted partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum as before paid to the said Duke himself, and of the renunciation of the said former tack: and find, therefore, that this tack of the 30th of December 1803, ought to be considered in this question with Hyslop, as let with diminution of the rental, and not for the just avail. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

For the Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondent, *Jas. Moncreiff, J. A Maconochie.*

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THE DUKE OF BUCCLEUCH v. HYSLOP.

NOTE.—The speeches of Lord Chancellor Eldon and Lord Redesdale in disposing of the *whole* of these appeals in the Neidpath and Queensberry entails will be found reported in Bligh, vol. i., p. 340.

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THE DUKE OF ROXBURGHE v. WAUCHOPE, &C.

DUKE OF ROXBURGHE, . . . *Appellant;*

JOHN WAUCHOPE, W.S., and OTHERS, Trustees and the Legatees of the late John, Duke of Roxburghe, . . } *Respondents.*

House of Lords 25th May 1820.

DEATHBED—REDUCTION.—A reduction was brought by the appellant, to set aside a certain settlement of the Duke of Roxburghe, on the head of deathbed. Held him to be barred from challenging the deathbed deed, 1804, by the previous *liege poustie* deed of 1790, which had not been expressly revoked.

John, third Duke of Roxburghe, by a *liege poustie* deed of settlement executed in 1790, conveyed his unentailed lands to his sisters, Ladies Essex and Mary Ker, as will be seen from the report of their case arising out of the same matters, vol. v., p. 559.

By this deed, he reserved full power to alter or revoke, even on deathbed.

Part of these lands had, by the previous investitures, stood destined to the person or persons who should succeed as heirs of entail to the Roxburghe estates. These were the lands of Kelso; but by this deed they were expressly conveyed to Ladies Essex and Mary Ker, whom failing, to the heirs of tailzie having right for the time to the earldom and estate of Roxburghe. This deed was followed by a trust-deed in 1803, by which he conveyed his whole unentailed heritable property, as well as his moveable, in favour of the respondents as trustees, for the purpose that they might dispose of the same, and, after paying his debts and legacies, the residue was to be "made and conveyed over or applied or employed "by the said trustees to, and in favour of such person or "persons, or for such uses and purposes as I have directed "or shall direct, by any deed executed or to be executed by "me for that effect, at any time of my life and even on "deathbed."

In March 1804, he executed a deed of instructions to the

trustees named by him under the trust deed 1803, and made a distribution of his unentailed heritable estate, &c., which implied a total alteration, but there was no express revocation either of the deed 1790, or 1803.

Then followed the reduction brought by Ladies Essex and Mary Ker, to reduce these deeds *ex capite lecti*, in order to take up what fell to them as heirs-at-law.

The result of this action of reduction, the appellant contended, was, 1st, That in regard to the lands standing destined to the heirs-of-law in general, Ladies Ker succeeded to them. 2d, That in regard to the lands destined to heirs-of-law in general in the parish of Kelso, the ladies did not prevail.

He, therefore, raised the present action of reduction, to set aside those deeds as at his instance, concluding that it should be found and declared, that by the execution of the deed of instructions, 1804, John, Duke of Roxburghe, did effectually destroy the *liege poustie* deed 1790, in so far as the same was prejudicial to the heirs of entail, or to their claims to any lands which stood destined to them by the prior rights and investitures thereof. And further, that it should be found and declared, that the said deed of instructions made and executed by John, Duke of Roxburghe, on the 19th March 1804, and relative trust-deed of 5th November 1803, are null and void, and ought to be reduced, in so far as the same pretend to convey away or dispose of any lands which, prior to the deeds 1790, 1803, 1804, stood destined to his Grace's heirs male.

This action, therefore, had reference to the unentailed estate of Kelso; and called both Ladies Essex and Mary Ker, as well as the trustees as parties.

No appearance was made for the Ladies Ker; but defences having been given in for the trustees, the Lord Ordinary, by a special interlocutor, found "That the right of chal- Feb. 18, 1814.
"lenging upon the head of deathbed, is only competent to
"the next heir of investiture *having an interest*, and who,
"in virtue of the deathbed deed being set aside, would
"succeed to the lands and heritages therein contained:
"Finds that if the deathbed deed in question were set aside
"the deed, 1790, which is not expressly revoked by th
"deathbed deed, must exclude the succession of the heirs
"of entail; and that the pursuer, James, Duke of Rox-
"burghe, has no interest, as heir of investiture, to insist
"upon the reduction of the deathbed deed, 1804; and,

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"therefore, assoilzies the defenders from the general conclusions of the reduction. And with regard to the particular conclusions as to that part of the lands situated in the parish of Kelso, the investitures of which formerly stood to the heirs of entail, but which were again conveyed by the deed, 1790, to the Duke's sisters, and which deed contains an obligation upon his sisters to convey these lands to the heir of entail for the time being, upon his discharging them of all claims whatsoever against them, as the Duke's representatives, and making payment to them of £3000 sterling, at either of the two first terms of Martinmas next, after his death: Finds, that the right to those subjects was actually conveyed to his sisters; and that, therefore, the right and interest of the pursuer, as the heir of investiture, to challenge the deathbed deed in 1804, was expressly excluded by the deed in favour of Ladies Essex Ker and Mary Ker, in 1790. Therefore, finds also, that the pursuer has no right to challenge the deed in question, *ex capite lecti*, as to these lands; and assoilzies the defenders and decerns."

July 11, 1815. On representation, the Lord Ordinary adhered "in so far as relates to the general findings; but with regard to the alternative conclusion as to the lands in the parish of Kelso, appoints the parties to be further heard."

Feb. 14, 1818. The Lord Ordinary thereafter found, "With regard to the lands lying in the parish of Kelso, in respect that the former investiture of the lands, in so far as it stood in favour of the heir of entail, was altered by the deed, 1790, executed by John, Duke of Roxburghe, in *liege poustie*, and that the representer cannot claim any benefit from that deed, without being subjected to all the conditions contained in it as a disponee or legatee, in which character he was barred from challenging the deathbed deed in question, and as he cannot now fulfil the conditions under which alone he could claim the benefit of that deed, refuses the representation, and adheres."

July 4, 1816. On reclaiming petition, the Court pronounced this interlocutor:—"Adhere to the interlocutor reclaimed against, in so far as it finds that the pursuer is barred by the deed, 1790, from challenging the deathbed deed 1804; and that he has no right to challenge the said deed, *ex capite lecti*, as to any lands to which he would have had right as heir, *alioqui successurus;* and farther, find, that the pursuer, the Duke of Roxburghe, is not entitled to avail himself of the

"right of redemption of the Kelso lands, contained in the "deed 1790, inasmuch as the obligation therein contained, "is not imposed on the defenders by the deathbed deed under "which they take these lands." On further reclaiming petition, they adhered.

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

LORD CHANCELLOR (ELDON) said:—*

"My Lords,

"Having looked carefully into this case of the Duke of Roxburghe and Wauchope, and others, I can see no sufficient reason for saying that this judgment should be at all altered. In consequence of which, the form of the House requires that I should move that the judgment be affirmed, it appearing to me, upon the best consideration I can give the case, that upon all the points controverted at the bar, the respondents are right."

It was therefore ordered and adjudged that the interlocutors complained of in this appeal be, and the same are hereby affirmed.

For the Appellant, *Mat. Ross, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, John Clerk, J. Fullerton, Henry Cockburn.*

[Tinwald Entail.]

CHARLES, MARQUIS OF QUEENSBERRY, . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart., WILLIAM MURRAY, Esq. of Henderland, and EDWARD BULLOCK DOUGLAS, Esq., Executors of the late Duke of Queensberry, } *Respondents.*

House of Lords, 26th May 1820.

ENTAIL—CONTRAVENTION—DAMAGES—LEASES.—The entail of Tinwald restricted the heirs of entail from granting "tacks or "rentals for any longer space than nineteen years, and without "any diminution of the rental; or for the setter's lifetime in case

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* From Mr Gurney's short-hand notes.

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" of any diminution of the rental; and that it should not be " lawful to any of the said heirs to take grassums, but to set " the said lands and estate at such reasonable rents as can be " got therefor." The late Duke, a few years before his death, and while former leases were current, made the tenants on the estate renounce their leases, for new leases, for nineteen years, at a small increase of rent; but with no grassum paid. In an action of damages raised by the appellant, held that such claim was not relevant. In the House of Lords partly affirmed; and *quoad ultra* remitted.

The late Duke of Queensberry succeeded in 1778 to the estate of Tinwald, under an entail executed in 1769, by his cousin Charles, Duke of Queensberry and Dover.

The entail contains the following clause, regulating the powers of the heirs called under it, in regard to granting of leases: " And with and under this restriction, that it shall " not be lawful to any of the said heirs to set tacks or rentals " of the said lands, or any part thereof, for any longer space " than nineteen years, and without any diminution of the " rental, or for the setter's lifetime, in case of any diminution " of the rental; and that it shall not be lawful to any of the " said heirs to take grassums for any tack or rental to be set " by them; but to set the said lands and estate at such rea- " sonable rents as can be got therefor, so that the succeeding " heirs may not be hurt or prejudged by the heir in posses- " sion setting the lands at an under value, or taking, by way " of grassum, what falls annually to be paid out of the pro- " duce of the lands."

In strict consistence with what he conceived to be his powers under the above clause, the late Duke continued, from the period of his succession, to let leases, from time to time, for nineteen years, at such rents as he understood to be equal to the fair value of the farms, without, in any instance, stipulating a grassum, or any consideration, but the rent payable by the tenants. In this way the rental of the estate, which, at the date of his succession in 1778, amounted to £4124, had, by 1802, been raised to £6980, and was further increased to £9686 at the time of his death, in 1810.

But this was not achieved, it was stated, without some effort; and it was stated, that it was well known about the beginning of the present century, from various causes, a great spirit of improvement began to manifest itself among the tenantry in Scotland, who were now very generally satisfied of the advantage of adopting the most approved modes of

cultivation, and of a liberal expenditure of capital in improving their farms. The lands in Dumfries, where the Tinwald estate was situated, were at this time also, in point of cultivation, very far behind the most improved districts of Scotland.

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It was in order to encourage this improvement, the respondents stated, that the late Duke resorted to the plan of making the tenants renounce their current leases (which at the time had only a few years to run), and granted new leases for the period of nineteen years, in most instances with an increase of rent; in one or two others, without any increase of rent; and it was alleged that it was only in this way, that this improvement system could be carried out.

Accordingly, after a survey of the value of the farms, by a surveyor, he received the renunciation of their farms from 110 of his tenants, and granted new leases as above described, without any grassums being paid, and with only an increase of rent according to value, or fair rental put upon them by the surveyor.

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The Duke died in 1810, and was succeeded in the Tinwald estate by the appellant; at which time, about three-fourths of the leases which had been renounced in consequence of the above transactions, would have naturally expired.

Vide Summons narrated in Lord Eldon's speech.

The appellant, in these circumstances, brought the present action of damages, founded on an alleged contravention of the entail, committed by granting the leases in question, setting forth, that the late Duke had taken grassums, by granting new leases for nineteen years, of different farms on the estate, to the tenants in possession, several years before the expiry of the then current leases, upon the tenants agreeing to pay an increased rent. That by thus letting new leases several years before the expiry of the old ones, all competition with the tenants in possession was prevented, so that the lands could not be let at the best rents which might have been got.

For Defences, *vide* Lord Eldon's speech, p. 575.

The respondents, in their defences, stated, that the Duke had in no respect exceeded his powers under the entail, as he had neither let any part of the estate for a longer period than nineteen years, nor taken grassums. That he had let the leases complained of, at rents which were reported to him by a person of approved skill to be fair and adequate; and that the claim of damages was, therefore, utterly groundless.

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June 25, 1812.

The Lord Ordinary (Gilles) pronounced this interlocutor upon the summons and defences: "Having heard parties "procurators upon the grounds of the libel and defences, "Finds, that in those cases where renunciations were ob- "tained by the late Duke of Queensberry of the former "leases, and new leases granted of the same lands for a "longer endurance, but without any increase of rent, there is "no room for an allegation that a grassum was received by "his Grace, or for a claim of damages on that account, but "finds, that in all cases where, upon obtaining renunciations "of current leases, the Duke let the lands of new to the same "tenants for increased rents, the renunciation, with the addi- "tional rent thus obtained under the new leases, is to be "considered as a grassum paid to his Grace. And finds, "that the nature of the transaction in such cases, affords real "evidence that the Duke did not, as enjoined by the entail, "set the lands and estate at such reasonable rents as could "be got therefor; and, therefore, finds damages due to the "pursuer, and decerns; superseding extract till the first box- "day in the vacation. Before answer as to the *quantum* of "damages, ordains the pursuer to give in a special conde- "scendence of the damages claimed by him, and for what "leases and lands." The appellant represented against this

May 19, 1813.

interlocutor. The Lord Ordinary before answer ordered a condescendence specifying the different leases granted by the Duke on account of which the appellant now claimed damages.*

The Lord Ordinary's interlocutor being again represented against, and the condescendence having been given in, his Lordship pronounced this interlocutor, allowing a proof to the pursuer of his condescendence, and to the defender of

June 7, 1814.

his answers.

Against this interlocutor a reclaiming petition having been brought to the Inner House, the Court pronounced this interlocutor: "Having resumed consideration of this petition, "and advised the same with the answers thereto, they alter

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* Note by the Lord Ordinary:—

"The Lord Ordinary still remains of the opinion expressed in his last interlocutor, viz.: That in the cases there mentioned, the renunciation with the additional rent must be held to be truly a grassum; and that these circumstances do at any rate, afford real evidence that the lands were not let by the renewed leases at such reasonable rents as could have been obtained therefor," &c.

For full Note, *vide* Lord Eldon's speech, p. 564.

"the Lord Ordinary's interlocutor reclaimed against, sustain "the defences, assoilzie the defenders from the conclusions of "the libel, and decern; but find the pursuer not liable in the "expense of process."

On second reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The leases executed by the late Duke of Queensberry, must subject his executors to the appellant in a claim of damages, as they were granted substantially for grassums contrary to the strict prohibitions of the entail under which he held. 2d, Even supposing, that the consideration received by the Duke could not be held to be a grassum, the leases having been deliberately and systematically let at an under-value, fall under the other prohibition of the entail by which the possessor is bound to let the lands at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt or prejudiced by the same being let at under-value.

Pleaded for the Respondents.—1. The late Duke of Queensberry did not, by the leases in question, infringe that provision of the leasing clause by which the heirs are prohibited to take grassums. It is not alleged, that any consideration was stipulated by the leases, or received by the Duke at the time, or after they were granted, except the rent payable termly by the tenants; but the appellant contends that in those cases where there was an increase of rent, this increase, when coupled with the renunciation of the remainder of the former lease is of the nature of a grassum. The leases thus renounced were, it is said, of considerable value, and the tenants, in giving up, really paid to the Duke what was equivalent to the sum they would have brought in the market. But all this is fallacious. If the Duke, on obtaining the renunciation, let the farm on the same terms as before, he is no gainer by the change. If he lets at a lower rent, he is a loser. If at an increased rent, he reaps the advantage; but it never can follow that, if he lets at a rise of rent he commits a contravention of the entail, and is liable in damages. 2. Besides, the rents payable by the leases current at the time of the appellant's succession, are such as, on a fair construction of the leasing clause, the Duke was entitled to accept of, and the proof of their inadequacy offered by the appellant, is totally irrelevant. 3. Separately, the leases complained of are perfectly consistent with the provisions of the

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Act of Parliament, 10 Geo. III., c. 51, and are authorised and protected by that statute.*

After hearing counsel,

The LORD CHANCELLOR (ELDON) said,†

"My Lords,

"This is a most important case, and, therefore, I shall not express my full opinion upon it, until I have given to it further consideration. If the leases could be maintained, under the 10th Geo. III., there would be an end of the case, but I decline, for the present, giving any opinion upon that point. There are an hundred and ten leases, one in 1799, one in 1800, one in 1802, between fourscore or ninety more in 1804, two more in 1807, and three-and-twenty more in 1808; and there is one thing common to all these leases, that they were let upon the renunciation of former tacks. I think that circumstance pervades the whole of them. They were made by the late Duke of Queensberry; and with respect to some of them (seventeen of them) the old tacks which were renounced, if they had not been renounced, would have continued in force and effect for several years after his death.

"The summons is dated in the year 1812, and is to this effect; it states, that the deceased William, Duke of Queensberry, succeeded to the lands and estates in virtue of a deed of entail, which is set forth in the summons: That he made up his titles in the regular form, and possessed the lands and estates solely in the capacity of an heir of entail, and under all the limitations, fetters, and restrictions contained in the deed of entail above-mentioned. It then proceeds to state, what I would term the leasing clause—the clause regulating the powers of the heirs of entail in granting leases:—'And with, and under this restriction, that it shall not 'be lawful to any of the heirs to set tacks or rentals of the lands, 'or any part thereof, for any longer space than 19 years, and 'without any diminution of the rental, or for the setter's lifetime, 'in case of any diminution of the rental; and that it shall not be 'lawful to the heirs to take grassums for any tack or rental to be 'set by them, but to set the lands and estates, at such reasonable 'rents as can be got therefor, so that the succeeding heirs may 'not be hurt or prejudiced by the heir in possession setting the 'lands at an undervalue or taking by way of grassum what falls 'annually to be paid out of the produce of the lands.'

"Now, my Lords, I believe I may venture to state to your

* These are merely the heads of the argument.

† From Mr Gurney's short-hand notes.

Lordships, that where, in an English settlement, a person is made tenant for life, and there is a power of leasing, the lease must be made strictly conformable to the power; but there is undoubtedly a very great difference between an English tenant for life, with a power of leasing, and a person claiming under a Scots entail, as to the construction of restrictive clauses. I take the liberty of stating *that*, that it may not be supposed I overlook that distinction, or that I am one of those who may be represented as an enemy to Scots entails. I may, perhaps, in my judgment have very much erred as to Scots entails. No man is more willing to profess an inclination of opinion that *that* may be the case; but I do assure your Lordships, I have never differed in judgment from those whom I so much respect, namely, the Judges of the Court of Session, without a conviction that it was my bounden duty to do so. If I have erred it is not, therefore, from an enmity to Scots entails, but from a persuasion that I was bound so to decide.

"My Lords, with this distinction, between the powers of an English tenant for life, with a power of leasing, and the powers of one in possession under a Scotch entail, it will certainly become necessary to consider, 1st, Whether the leases in the way in which they have been made, are leases granted on the taking of a grassum; and, 2dly, If the leases in the way in which they have been made, are leases granted on the taking of a grassum, whether the construction, which has been attempted to be put on this restrictive clause, is the construction, that ought to be given to the words, 'But to set the lands and estate at such reasonable rents 'as can be got therefor, so that the succeeding heirs may not be 'hurt or prejudged by the heir in possession setting the lands at 'an undervalue, or taking by way of grassum what falls annually 'to be paid out of the produce of the lands,' whether the construction which contends that they are not to be let at an undervalue, by taking a grassum, or the construction which contends, that they are not to be let at an undervalue, whether you take a grassum or not, if you let at a less rent than can be reasonably got therefor is the proper construction? My Lords, upon that I would state myself, no further at present, than only to shew I have taken a view of the questions in the way in which I apprehend they could be meant to be addressed to us from the bar; and I am anxious to discharge the duty that I am now attempting to discharge, with a view of learning when I shall come to the end of it, whether I have guarded, in my view of it, all the questions that are meant to be put to the House.

"My Lords, this summons goes to state 'that, notwithstanding 'the clause prohibiting the taking of grassums, and binding the 'heirs of entail to set the lands for such reasonable rents as could 'be got therefor, or, in other words, for the best rents that could 'be got therefor, so that the succeeding heirs might not be hurt

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'or prejudged by the heir in possession, setting the lands at an 'undervalue, the deceased William, Duke of Queensberry, in 'order to procure, during his own lifetime, the benefit of a present 'increase of rental, though at the expense and to the great hurt 'and prejudice of his succeeding heirs of entail, had been in use 'for a considerable number of years preceding his death, to grant 'new nineteen years' leases of the different farms of the entailed 'estates, to the tenants possessing the same at the time, several 'years before the expiry of the leases under which they were then 'possessing the lands, upon the said tenants' granting renuncia-'tions of the unexpired terms of their old leases, and paying an 'increased rent for the same. That, by thus letting new leases 'of the lands in question, several years before the expiry of the 'old ones, to the tenants then occupying the lands, all competi-'tion whatever, was completely excluded, and it was absolutely 'impossible, in such a case, that the lands could be let at the best 'rents that might have been got for the same.' To be sure, if that proposition can be maintained, that, in consequence of these circumstances, it was absolutely impossible that they could be let at the best rents that might have been got for the same, that would be conclusive. Then they give a reason: 'As no 'stranger could possibly compete with the tenant of the farm, 'who had, in many cases, six and eight years of his former lease 'yet to run, and in some cases even a longer period, the land-'lord, in acquiring his object, of an increase of rental, long before 'the expiry of the existing leases, was evidently acting at the 'mercy of the tenant possessing at the time, who would certainly 'take care that, in estimating the rent to be paid by him upon 'this new lease, he should be amply paid and compensated for 'the unexpired term of his former one.' Now, undoubtedly it is a perfectly fair thing, if we were agitating these things in a Scotch Court on the same principle as we should discuss a similar question, if it arose in this part of the island, namely, Whether a tenant for life with a power of leasing, had let for the most reasonable rent he could get for the same? you must of necessity inquire into that fact, by looking at the nature of the evidence which could be given, attending to the nature of the transaction; because, if a person deals with the tenants who are upon his estates for their renouncing their leases, and granting new leases to them, and if it is generally understood, as it could not but be generally understood, when you are dealing in ten instances in this mode, and dealing with no stranger at all; according to the case as it is stated to us, nothing can be more improbable than you should give in evidence any offer a stranger made. He is shut out by the nature of the transaction, and, therefore, where the person succeeding to the estate thought proper to insist that the lease had not been so let as to be according to the power, he

must proceed to show that it was not so let according to the power, by such evidence as the nature of the case would admit of, and the one head of evidence would undoubtedly be the true value of the estate, though, probably, no person can be ignorant that, in a great number of cases, it is impossible to expect that you can get at a reasonable rent for the estate, but by getting the utmost worth and value of it, to be let (got?) for the time, and, according to our proceedings here, I believe it will be found, as I had occasion formerly to express, in other cases, that ninety-nine times out of a hundred, where a man reserves to those who are to come after him, what he reserves to himself, inasmuch as human prudence will always in some measure be regulated by a regard to its own interests, he is doing that (if one may venture to use such a phrase, though I would wish to abstain from it), which a prudent administrator of an estate would do, if only himself were interested; a very possible criterion of knowing whether the tenant for life has got the most reasonable rent that can be got for an estate, being supplied by looking at what an individual would say was the rent at the moment. I believe I speak in the hearing of some who know—I am sure I know an individual myself who knows—that estimating what it was reasonable to have done in the year 1806, with a view to purchase lands in 1806, may be, long before 1820, thought to be a most extravagantly, unreasonable, and foolish proceeding. In this case, however, my Lords, it seems impossible to have given in evidence, offers made by other persons. Then they state, 'that in all cases there was 'absolutely a grassum paid by the tenant.' Now, if there was a grassum paid by the tenant, then also there is an end of it, and your Lordships will have to consider it, in order to determine whether a grassum was paid by the tenant or not,—1st, Whether the landlord was at liberty to take a renunciation of the lease? Because, if the landlord was at liberty to take a renunciation of the lease, and if the lease could not be renounced but by the tenant considering in some degree the value that he was, in some way or other, to have for the renunciation, unless the tenant would do what, in his disinterestedness, perhaps, a Scotch tenant might do, but what an English tenant, I am sure, would not do, namely, renounce—the value of the renunciation in the bargain he made with his landlord. If you are driven to admit, on the one hand, that he would look for a return for his renunciation, but are obliged to admit, on the other, that the landlord had a right to take the renunciation, it appears to me difficult to say that it is not the price of that renunciation; but when that is paid to the landlord, you must consider what is meant by the words, 'the landlord.' The price of that renunciation is spread all over the new lease. It is not the price paid to the individual who happens to be the landlord at the time the new lease is made,

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but it is paid to that person or those persons who, from time to time, during the currency of the new lease, sustain the character of landlord—the landlord for the time being.

"My Lords, there is another point which has been raised at the bar, which appears to me to require also attention, and that is what has been stated in the course of the argument to-day, which, I dare say, there may be a very solid foundation for stating; but I cannot help saying that I was a good deal surprised at hearing that was the law; I mean that the proprietor of the estate for the time, should have let at such a rent as could reasonably have been got for the same, if he took a renunciation of the former tack, but with an allowance and reduction for so many years as the tack had to run. Now, I have no doubt at all—not the least doubt—in saying, that if this could be looked at with analogy to what might happen in this country on a power, that that could not be good, and for many reasons. In the *first* place, it is not a lease in possession. In the *next* place, it is impossible that you can fix a criterion of rent property, because the rent which is to be fixed, is the most reasonable rent that can be got at the time of letting the lease; for instance, supposing the Duke of Queensberry had lived twelve years instead of six, after these leases were taken, the fair question as between those, to take the estate, and the executors of the Duke of Queensberry, would not be, Whether there was a fair rent taken at the time the lease was made? but, Whether it would have been a proper rent for the heirs of entail at the time the former lease was to cease, which was the time when the new rent was to be paid? therefore, upon that part of the case, it appears to me fit only to say, that I think it deserves more consideration, before I can be satisfied to accede to it.

"My Lords, they then go on to state, 'That in this manner 'the deceased William, Duke of Queensberry, in contravention 'of the said deed of entail, and to the manifest defraud, hurt, and 'prejudice of the pursuer, and the heirs of entail succeeding to him 'in the tailzied lands and estates, let leases of the lands.' Then they proceed to state the various leases which he did let. 'That 'by this mode adopted by the late Duke, for the sake of present 'profit to himself, of letting the lands anew to the tenant then 'possessing the same, for the full term of years authorized by 'the entail, several, and in a number of cases, many years before 'the expiry of then existing leases, upon the tenant's renouncing 'the unexpired period of these leases, in consequence of which, 'the leases were let at most inadequate rents, and a virtual 'grassum actually given by the tenant.' My Lords, what a virtual grassum is, perhaps, I may a little better understand now, than I did some years ago, for I have seen, in cases which have been brought on your table, or, rather, cases referred to here,

very nice distinctions between rents and grassums. 'That the 'heirs of entail, therefore, have been grossly hurt and prejudiced, 'for had the leases been allowed to expire in common course, the 'very great bulk of the above-mentioned valuable and extensive 'estates, indeed the whole of them, with the exception only of 'twenty farms out of the farms above-mentioned, which are up-'wards of 120 in number, would have, ere this time, expired, and, 'in consequence of the free competitions which would, in that 'case, have taken place, the rents even at a very moderate estimate 'would have considerably more than trebled the present amount.' They then proceed to state a circumstance, the effect of which, in the consideration of an action for damages, may not be immaterial:—'That, although, from the circumstance of the deed 'of entail not being recorded in the register of entails, in terms 'of the Act of Parliament, it might be doubted how far the 'pursuer was entitled to reduce the leases in question, *quoad* the 'tenants; it cannot be doubted that he is legally and justly en-'titled to full compensation and redress from the separate means 'and estate of the deceased William, Duke of Queensberry, for the 'immense loss and damage he has sustained by and through the 'above-recited contravention of the entail.' It then proceeds to state the applications made to the executors; and then it prays compensation in damages in the manner which I shall mention to your Lordships; and I confess, I was greatly relieved by Mr Clerk's stating that we were to consider this only as a random statement of damages, and that we were to apply our rule of damages to the case as we might think it expedient and just, to apply to the case. But here there are, as I stated to your Lordships before, 110 leases, and the damage is sought with respect to the whole in this prayer, in the summons, namely,—'That the executors do 'make payment to the Marquis of Queensberry, pursuer, of the 'sum of £150,000 sterling, in the name of damages sustained by 'him in consequence of the contraventions of the entail on the 'part of the Duke, or else to make payment to the pursuer and 'the heirs of entail succeeding to him in the tailzied lands and 'estates, of a free yearly annuity of £15,600 sterling, or such 'other annuity, more or less, as shall be modified and ascertained 'by our Lords, to be the difference between the amount of the 'rents presently payable under the leases above-mentioned, and 'the present true yearly worth and avail of the lands, and con-'tinuing the payment of the same, during the whole terms and 'years of the currency of the presently existing leases of the lands, 'and progressively, as the leases shall expire and determine, 'making such rateable deduction from the amount of the said 'annuity as may be equivalent to the present yearly worth and 'value of the lands, whereof the leases shall so expire and deter-'mine, so that the said annuity shall always and only continue

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'proportionate to the value of the lands and farms, whereof the 'leases are still current and in existence at the time, and shall 'finally cease and determine, when all the leases above-mentioned 'of the lands and farms shall have expired.'

"Your Lordships will perceive, in the list of leases mentioned in the condescendence, that this summons, having been dated in February 1812, several of the old leases, and many of them of considerable value, had not then expired, so that this question would arise, Whether, if the pursuer could claim, in respect of finding leases that could or could not be disturbed, finding upon the estate leases, not according to the restrictive clause, as he would allege, he could insist upon the damages in respect of these leases having been made, not as he would urge, according to that restrictive clause? But, on the other hand, if the old leases, which had been surrendered had been still in existence, as several of them would have been still in existence, and would not have expired, if in existence, till long after this summons was preferred to the Court of Session, then a question would arise, How the pursuer was to make out that he was damnified before the time he came into the Court of Session, and between the time that he came into the Court of Session, and the period at which those old leases would have expired, when *de facto* he would have been entitled, the moment he began to sue, to larger rents upon those leases, and would have continued entitled to larger rents upon them till the time that the old leases had expired. That difficulty, however, I thought, might have been got over, in these cases, on principles on which we cannot contend with it in our Courts. It is enough, therefore, to say, that it deserves consideration.

"My Lords, there is, besides in this prayer, ground for observing how extremely difficult it is to know how to deal with such a case as this, because if you will read the prayer of this summons, as I understand it—I am not sure that I do understand it—but it shews the extreme difficulty, I would add, the extreme injustice of being too nice with reference to the question, Whether the most reasonable rent has been got for the thing which has been let with ordinary and common caution and prudence—for, if I understand the prayer of this summons, when it seeks to have, as the measure of damages, an annuity constituted by the difference between the rent that has been reserved, and the yearly value of the lands, it goes on, not only to desire that the damages may be estimated on that *ratio*, and that principle on which the summons is preferred, but that *de anno in annum*, during the currency of these leases, there may be that computation made to shew the damage, and that shews, in the nature of the thing, that the quantum of reasonable rent that may be got to-day, is very different from the quantum of reasonable rent that might have been got this day twelvemonth, or the quantum of reasonable rent that

may be got a twelvemonth hence. It is not, therefore, to be weighed in golden scales, or in very nice scales. My Lords, it appears, however, that the summons having prayed for damages, in respect of those leases which had come in, they state the leases which would not have been expired at the time. That is open to this observation at the bar, to which your Lordships will give due attention.

"My Lords, the proceedings which have taken place in this case have been the interlocutors of a very eminent person, Lord Gillies, and the interlocutor of the Court of Session. My Lords, the first interlocutor is in these words: 'It finds, that in those cases, 'where renunciations were obtained by the late Duke of Queens-'berry, of the former leases, and new leases granted of the same 'lands, for a longer endurance, but without any increase of rent, 'there is no room for an allegation, that a grassum was received 'by his Grace, or for a claim of damages on that account,' that is, upon account of receiving the grassum, 'But finds, that in all 'cases where, upon obtaining renunciations of current leases, the 'Duke let the lands of new to the same tenants for increased 'rents, the renunciation, with the additional rent thus obtained 'under the new leases, is to be considered as a grassum paid to 'his Grace.' And if, in point of law, it is to be considered as a grassum, and is to be considered as a grassum paid to his Grace, there is an end of the case. Then there is another finding, 'Finds, 'that the nature of the transaction in such cases affords real evi-'dence that the Duke did not, as enjoined by the entail, let the 'said lands and estate at such reasonable rents as could be got 'therefor.' Now, supposing the former part of the interlocutor to be unfounded, and that the renunciation is not to be considered as a grassum, your Lordships would have to consider, whether the construction that has been put upon the restrictive clause to which I referred before, is a construction which connects it with grassum, or whether the true construction leaves it unconnected with grassum, and makes it a substantive injunction, that you shall not let for a rent less than could be reasonably got for the same; because, if that be a substantive prohibition, and if Lord Gillies was right in saying, that the nature of the transaction afforded real evidence that the Duke did not, as enjoined by the entail, let the lands and estate at such reasonable rents as could be got, it would be a question why we should go into proof of that; but I am prepared myself to say that the real value and worth of the land at such a time being more than the rent reserved by the lease at the time, is, in my judgment, no evidence to prove that the lease was not let at the best rent that could be reasonably got at the time. That may be made out one way or the other, from other circumstances.

"My Lords, Lord Gillies proceeds, as persons with minds such

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as his usually do, by endeavouring to set the matter right as soon as may be. In another interlocutor, he says: 'He still remains 'of the opinion expressed in this last interlocutor, namely, that 'in the cases there mentioned, the renunciation, with the addi- 'tional rent, must be held to be truly a grassum, and that these 'circumstances do, at any rate, afford real evidence that the lands

Note to interlocutor.

'were not let by the renewed leases, at such reasonable rents as 'could have been obtained therefor; but by the above interlo- 'cutor, all this is, in the meantime, left open, in order that, be- 'fore the case is carried into the Inner House, the facts relative 'to it, may be fully ascertained, and particularly, an opportunity 'afforded to the pursuer, on the one hand, of proving his allega- 'tion, that by the renewed leases, the lands were let greatly below 'their value, and to the defenders, on the other hand, of proving 'what is so strongly insisted on in their representation—that all 'the lands were, by the renewed leases, let at reasonable and 'adequate rents.'

My Lords, a condescendence was given in, and that condescendence your Lordships have heard read. I have it now before me: 'In obedience to the above interlocutors, the pursuer con- 'descends upon and offers to prove the following facts and cir- 'cumstances, which he shall endeavour to state as succinctly as 'possible, observing the same order in which the different farms 'are specified in the summons upon which the action is founded.' And then they state, item by item, these hundred and ten leases, and, with very few exceptions, I think the effect of the statement is—let in such a year, at so much—the lease renounced in such a year, so many years of it being then unexpired, and a new lease granted at so much—real value at that period £147, 10s. Now, I state again, as I have before taken the liberty of stating to your Lordships, if this had been an averment made in Westminster Hall, it would have followed from the words of the clause, Why have they not made an averment, that £147 was the best rent that could be reasonably got therefor at the time? and, Why have they not given the real value in evidence, which would have had more or less effect according to the greater or less difference there was between the rent actually reserved, and that real value, which might be so inadequate, that, as Lord Thurlow says, when a man heard the difference stated, it would startle him, and likewise any other circumstances in evidence that might account for the difference being more or being less between the real value and the rent at which it is let. There are some particular cases, however, that might deserve particular attention; and as it has now been stated, that the proof must be applied to each of these leases severally and respectively, instead of being applied to all together, as seemed at first intended, I would mention again item 87, which is the 'Townfoot of Mousewald,' let in 1791 at £47, valued in 1801 at

£58, lease renounced in 1807. Now, there can be no doubt, I presume, that it would be a fair observation to a jury, that the value of the evidence which is called the valuation of Alexander in 1801, would be very different if a lease was made in 1801 than it would be considered as being with reference to a lease not made till 1807; and if in 1801, that valuation was a right one at £58. Still, when it is here stated, that 'during the subsistence of the 'previous lease at £47 rent, a part of this farm (being in point of 'value, greatly less than a half), was subset by the tenant at '£45, which sub-rent was, in 1804, increased to £52, 10s.' So, that, according to this, the valuation of Alexander in 1801 was £58, and the lease granted was £60, that is, £2 more than the valuation, and one-half of it had, between 1801 and 1807, been let for no less than £52, 10s., which is more than double—*that* would be a strong case.

My Lords, there was another interlocutor pronounced by the Lord Ordinary, which 'allows the pursuer a proof of the facts 'stated in the condescendence, and the defenders a proof of the 'facts stated in the answers, and to both parties a conjunct proba-'tion thereanent.' The respondents reclaimed to the whole Court against the above interlocutor, and their Lordships 'having re-'sumed consideration of this petition, and advised the same, with 'the answers thereto—Alter the Lord Ordinary's interlocutors 'reclaimed against; sustain the defences; assoilzie the defenders 'from the conclusions of the libel, and decern; but find the pur-'suer not liable in the expenses of process.' A petition and additional petition having been presented by the appellant, their Lordships 'having resumed consideration of this petition, and of 'the original petition, and advised the same with answers thereto—'They refuse the desire of both petitions, and adhere to the inter-'locutor reclaimed against.' And it has been correctly stated to your Lordships from the bar, that in both hearings, the Court were perfectly unanimous; and not only perfectly unanimous, but, as it appears to me, expressed no doubt at all that the judgment, which they did so unanimously pronounce, was right. Now, whether that judgment does or does not amount to this assertion, namely, that if all the allegations of the pursuer are true, still they would not support the pursuer's claim, is a matter, I think, for consideration; for if they would support the pursuer's claim, then, it appears to me difficult to say why he was not allowed to make proof of them—they being all taken for granted to be true, that they would not sustain the pursuer's claim. Then, in the first way of putting the case, your Lordships will have to decide, whether they would or would not, if true, sustain the pursuer's claim. If you are of opinion they would sustain the pursuer's claim, then it will be extremely difficult to say why they are not to be allowed to go to proof of them. And it appears remark-

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able, as Mr Clerk has strongly put it, that we can in judgment take the allegations of the defender to be true, and yet not allow a proof of the pursuer's allegations. For instance, there is no doubt that Alexander made a valuation; but as to the prudence and skill of Alexander, they may depend on circumstances. We cannot, however, come to this view of the case until we have disposed of other questions. I mean those I referred to in the first of my observations, and which undoubtedly, as they affect the doctrine of entails in general, are of much more importance to be well determined than any points which arise in this cause, and apply to this cause only. These are the general questions which have been raised. If I am wrong in my statement of them, I shall be extremely glad to be set right; and I would not be understood to have given any opinion whatever on any one of the points I have stated, meaning to reserve that for more mature and quiet consideration."

LORD REDESDALE said,*

"My Lords,

"I shall not go into this case at present, because it does appear to me to be of great importance in respect of entailed property in Scotland. I understand the final decision of the Court of Session to be a complete determination of the question upon the allegations contained in the proceedings, independent of the question respecting the propriety of giving evidence upon the subject; because the Court has entirely disposed of the cause, it is out of Court, as I may say; and, therefore, they have not certainly decided upon the question, whether the evidence should be given on the matters contained in the condescendence, but they have held, as I apprehend, that the case, as stated, does not give the present appellant a right to proceed in the action. That is the effect of the decision.

"My Lords, I apprehend that may have been decided upon grounds that have not been particularly adverted to in the argument before your Lordships. In the *first* place, at the time the action was commenced, all the leases that had been renounced, would have been in continuance, if they had not been renounced. I believe all of them, if they were in continuance at the time that the action was brought, then at the time that the action was brought, the Marquis of Queensberry had sustained no damage. If he died before the expiration of any of these terms, he never would have sustained any damage. Whether that was a matter considered or not, has not been stated to us; but, my Lords, in the additional petition, the Marquis of Queensberry does allege that these leases were granted by the Duke of Queensberry, *mala*

* From Mr Gurney's short-hand notes, revised by his Lordship.

fide, and to the prejudice of the succeeding heir. In the summons it is not so alleged, but it is alleged that the Duke had granted those leases to the manifest fraud, hurt, and prejudice of the pursuer, that is, the Marquis of Queensberry. Now, my Lords, I confess I have great doubt in this case, whether it is possible to maintain an action but upon the allegation that the Duke, in granting the leases, had acted *mala fide;* and in the summons *that* is not expressed. It is expressed that he had granted the leases to the manifest fraud, hurt, and prejudice of the pursuer, but not that the leases were granted by him with intent to defraud the pursuer, and that appears to me a very material consideration in this case.

"I conceive one can scarcely put the situation of an heir of entail in a Scotch entail, with a power of granting leases in a higher situation than a trustee. If you consider him a trustee in executing that power, he should so execute it as to have regard to the interest of his successor, that is considering him, I think, in the highest situation that he can be possibly considered. You cannot possibly consider him in a higher situation. Now, my Lords, if a trustee, in such a situation, had granted leases of this description, though they were really to the prejudice of the succeeding heir of entail, does it follow that damages can be recovered against the estate, and against the trustee who has acted without an intent to injure the succeeding heir of entail, acting honestly, in the transaction, and dealing with the property, as possibly he would have dealt with the property, if it had been his own? That is a great difficulty that impresses itself upon my mind. I do not find that the summons proceeds to that extent. The additional petition has an allegation to that extent, though not very distinctly; but that additional petition having that allegation, it seems to me it must have been considered that that was necessary to support the action. Under the circumstances of this case, therefore, the question that presses itself upon my mind is, whether to support this action, it is necessary to show, that the Duke of Queensberry, in what he did, intended to injure the heir of entail?

"My Lords, a decision has been cited to your Lordships, with respect to leases granted in this country, under a power for a tenant for life to grant leases for a certain term of years, at the best rent. My Lords, in that case it was proved that a lease was granted, I think, at £43; that there had been offered by another tenant a rent of £50 and above; by another, I think £60; but that the tenant for life, who was in possession of the estate, preferred the tenant at £43, and granted him the lease. This lease was impeached, and on its being impeached, the Court determined that that lease could not be set aside. The Court said, that unless it appeared that that lease, at an under rent, was granted under an undue partiality, or taking some advantage to the lessor, they

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could not impeach that lease. Now, my Lords, here, if the Duke of Queensberry had let these leases from undue partiality to the tenants, or from a personal dislike to his succeeding heir of entail, and for the purpose of injuring that heir, that might be a ground, perhaps, for taking damages, in respect of his having acted *mala fide* in the administration of the property. My Lords, that is a part of this case which strikes the most strongly upon my mind, and, I think it would be extremely important to have the ground upon which your Lordships are to decide this case, fully and well understood, because it must be of the utmost importance to all entailed estates in Scotland, where there are restrictive clauses, in respect of granting leases, that the persons in possession should know on what principles they are to act. My Lords, it is really a very serious consideration, whether a person, who, in that situation, is to be liable (supposing the entail be properly recorded, which it was not in this case), to a forfeiture of the estate, if he grants a lease to a tenant for less money than he might receive of another tenant. In the *first* place, if he is to forfeit the estate, unless he can procure a surrender of that lease, so as to purge the forfeiture, the loss of the whole property would follow. Your Lordships will, therefore, find that a person in that situation granting leases, would be in a situation of extreme danger; and even, in the prudent management of property, every person must know it is not always prudent to grant a lease to the person who offers the greatest rent. On the contrary, I know, in my own case, that a very intelligent man, and a very honest agent, has frequently advised me to accept the lowest offer, because, he says, the lowest offer always comes from the best tenant, and, therefore, it would be extremely unreasonable to forfeit the estate of an heir of entail in possession in Scotland, because he had acted as I should think fit to act, in possession of a fee simple estate. My Lords, it is also extremely material in another point of view. A person in that situation would not only be liable to forfeit the estate, for he could not purge the forfeiture, but if the lease could be sustained against the heir of entail, and the heir of entail could maintain a suit for damages for the granting of that lease, the consequence would be that he might be made to suffer to the very extent, supposing the lease to be valid. He might be made to suffer to a very great extent, without the possibility of any advantage to himself; and, on the contrary, supposing the lease to be avoided, he would then be responsible to the tenant for the injury that the tenant would sustain by that very transaction. If a long lease were granted for a term of years at a moderate rent, the tenant may have expended a very large sum of money, which might be his object in taking that long lease, and the tenant for life would be in a situation of extreme difficulty in respect of any leases so granted, though really in the prudent administration

of the property. My Lords, this induces me to think this a case for most serious consideration, and that your Lordships cannot sustain an action of this description against the representatives of the deceased heir-of-entail under such circumstances, without being perfectly assured, that, in what you are doing, you are proceeding of necessity in the administration of justice, and in such manner as not to injure all the persons in possession of similar estates administering those estates, as they would administer their own unfettered estates."

LORD CHANCELLOR.—"I move your Lordships that this case be further taken into consideration on Friday next.

Ordered.

Friday, 19*th May* 1820.

"LORD CHANCELLOR,*

"My Lords,

"In this case, in which the most noble Charles, Marquis and Earl of Queensberry, is the appellant, and Sir James Montgomery, Bart.; William Murray, Esq., and Edward Bullock Douglas, Esq., executors of the late William, Duke of Queensberry, are respondents, this was an action of damages brought by the Marquis and Earl of Queensberry, against the respondents as the executors of the late Duke of Queensberry, for damages incurred by the late Duke of Queensberry, in having let certain leases, which leases have been represented from the bar to be leases good as between the late heir of tailzie and the tenants in possession, but which leases have been represented as having been granted in wrong of the heirs who were to take after him, and, therefore, the representatives of the late Duke, are answerable to the present heir, the Marquis of Queensberry, who is now entitled to the possession of the estate, as heir of tailzie, and this is, undoubtedly, if the case is to be considered as a case in which the power of leasing required that the heir letting a lease should obtain the most reasonable rent that could be got therefor. If that be a substantive part of the restrictions and conditions or terms in the deed of tailzie, this is, certainly, one of the most important cases we have had ever to deal with, because, as far as the inquiry I have been able to make on the subject, has enabled me to judge, I believe it is the first case of the kind which has come from Scotland, and it is quite obvious that it must of necessity form a case that, in all probability, now this species of case has, for the first time, come before the House, that will establish principles, in the decision of it, which would lead to settling all questions of this nature, which it may be in the consideration of

* From Mr Gurney's short-hand notes.

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parties to bring before courts of justice, or, at least, it will settle those principles upon which Courts ought to govern themselves in like cases. My Lords, its importance is extremely obvious in every way of putting it. If an heir possessing an entailed estate in Scotland, lets leases, taking no more in rent to himself, and taking nothing by way of fine, premium or foregift, or any other benefit,—taking nothing for himself except what he reserves to those who are to follow him, still the question is open, whether he did, in so taking to himself, reserve, in the true sense of those words, the most reasonable rent that could be got? and, therefore, it is an extremely important situation in which he is placed, unless the principle on which it is to be decided, is a principle of perfect fairness, and which will protect him, if he means to act fairly. This would be the case where the tailzie had not been duly recorded, but where the tailzie is duly recorded, then the question certainly would not be a question for damages, as between the representatives of the late heir and the present heir, but the present heir would have a right to come into Court against the tenants, as in the late Queensberry cases, and to insist they had taken leases, not giving the best and most reasonable rent that could be obtained, and seeking, according to the Scotch forms, not for damages from the representatives of the late heir, but seeking to destroy the leases themselves, and thereby to create, on the part of the tenants, a demand against the assets of the late tenant in tail.

This case, therefore, is not a case which must, whenever it is finally decided, govern merely cases in which the action is for damages, but it may affect the whole tenantry, as well as all the landlords of the country; and considering what the law of Scotland is with respect to the powers of tenants in tail, who are, in truth, proprietors of the fee for the time being, and where they are not strictly prohibited, they are understood to be at liberty to lease, it is a case where the favourable principle to them should be carried as far as it can. It is the more important to consider this case, and weigh the principles on which to decide it; because, though I am not aware that any case in Scotland (taking this to be a substantive prohibition), has yet been decided, we know, in England, for a long series of years, there have been in constant use and habit, settlements by which persons are made tenants for life, with powers of leasing, which, almost always, in the terms of them (except as to leases in the west of England, where fines are allowed), require that the tenant for life should reserve the most reasonable rent that can be got. And this is not only the case as to tenants for life; but where there are tenants in fee, or in releases to uses, generally, during the minority, or where there is a forfeiture of the life estate, the trustees are to enter and enjoy for the life of the tenant for life, permitting him to receive the rents; there is a power to make such leases at the best rent that

can be got; and looking at our marriage settlements, which are in daily and hourly use, where powers of this kind are reserved to the tenant for life; and what is, perhaps, more to be considered reserved to mere trustees, both of them bound, from time to time, to get the most reasonable rent. Such has been the favourable interpretation pursued with respect to the tenant for life, and the lessee; and with respect to the trustee and the tenant under him, that, *unless there is fraud or gross partiality to the tenant, or unless there is negligence in inquiry, which amounts to evidence of fraud*, I believe our Courts have never thought themselves at liberty to disturb those leases, and speaking now as one of the oldest in the profession, of instances in which such leases have been disturbed, so great is the difficulty to be encountered, that the instances of disturbing them are very rare.

"Having stated the importance of the case, as a case in which leases are sought to be disturbed, we must not, altogether, lay out of our consideration the importance of establishing the principle, such as will enable persons to recover damages, where damages can be recovered according to the law of Scotland, and such as will enable persons to set aside leases in cases in which, according to the true intent and meaning of this power, damages in the one case should be recoverable, and the leases in the other considered void.

"With these general observations, your Lordships will permit me to state, that the action in this case was raised in the year 1812. Previous to 1812, it appears from the condescendence, that the leases which are stated in the condescendence, and which amount to no less than 110; for the perplexity in the mind of an English lawyer, in such a case as this, is considerable, when he recollects the number of questions in this part of the country, it would have been a separate action on each lease; but in this case, it is a general action upon 110, all lumped together. It appears that these 110 leases were granted prior to the time when the action was brought into Court, but upon renunciations of former leases, many of which would have been in existence at the time this summons was brought, if they had not been renounced when these new leases were taken. There is the first set of leases; and, without going through them particularly, I think from 95 to 110 inclusive, are all of them leases which were granted upon renunciation of former tacks, which former tacks would have been in existence, if they had not been surrendered and renounced when this action was brought into Court; and it will be pretty obvious, I think, to your Lordships, that it is rather difficult to say what cause of action the Marquis, in 1812, could have when, if he had happened to die before the term at which the old leases would have expired, he would have been, in fact, instead of receiving the increased rent upon the new leases, only receiving the smaller rent upon the old leases, if the leases could have been set aside.

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If the heir had insisted on a recal of the tailzie, the thing might be different, but if he had died before these old leases had expired, it is quite obvious, instead of being a loser by the grant of these new leases, he would have been a gainer by it.

"My Lords, the summons states, first, generally, the entail, and then follows this power: 'With and under this restriction, 'that it shall not be lawful to any of the said heirs to set tacks, 'or rentals of the said lands, or any part thereof, for any longer 'space than nineteen years, and without any diminution of the 'rental, or for the setter's lifetime, in case of any diminution of 'the rental.' Now, it is not necessary, in this case, to consider with any degree of particularity what is meant by these words, 'without any diminution of the rental, or for the setter's lifetime, 'in case of any diminution of the rental,'—a question which has arisen in other places, in which great attention has been given to determine what the meaning of it was, but it goes on to state, 'And it shall not be lawful to any of the said heirs to take gras-'sums for any tack or rental to be set by them, but to set the 'lands and estate at such reasonable rents as can be got therefor, 'so that the succeeding heirs may not be hurt or prejudiced by 'the heir in possession setting the lands at an undervalue, or 'taking, by way of grassum, what falls annually to be paid out of 'the produce of the lands.'

"My Lords, your Lordships will see, by and bye, that the very learned judge who executes the duty of Lord Ordinary, was of opinion that, where the Duke of Queensberry took renunciations of existing leases, and made other leases, though he reserved to himself no more than he reserved to the heirs of tailzie who were to take after him, or who should take after him, during the existence of these leases, yet, if he raised the rent, he took a grassum; and your Lordships have heard the argument to maintain that proposition. It was argued, on the other side, that this was no grassum; that an increase of rent in such cases was no grassum; but, then, in reply to that again, it was said, Be it so, still, if this is not to be considered as a grassum, the lands and estate have not been let at such reasonable rent as could be got therefor. Upon which it was rejoined, that this is no substantive restriction or prohibition in the power, but that it is merely exegetical, and explanatory of what the author of the deed meant by not taking grassums; that it is not a substantive prohibition in itself that you are to get the most reasonable rent. My Lords, with respect to that, without detaining your Lordships long in considering that question, I confess it does appear to me, taking the whole together, that it is a substantive requisition in the power, and therefore a substantive prohibition, that you are not to let but at such reasonable rents as could be got therefor; and with respect to the question of grassum or no grassum, my humble

Opinion as to reasonable rent.

On subject of grassum.

opinion is, and I speak it, with all deference to the great judge who looks on it in another view, that where the Duke of Queensberry took renunciations, and took renunciations granting to the tenants leases at an increased rent, within the intent and meaning of this power, he certainly did not take a grassum, because I think it obvious, upon the whole of these words taken together, what it was that the author of this deed meant should be considered as a grassum. But I go farther than that, because, if the Duke of Queensberry could take a renunciation of an existing lease, and could have set the lands, not to the old tenant, but to a new tenant at the very same rent at which he has set to the new tenant, it appears to me that it is impossible to say that, within the meaning of this clause, that lease would not be a good lease, whether it was to the new tenant or to the old tenant, provided it was let for the most reasonable rent that could be got therefor. If you once admit that the Duke could take a renunciation, and could let to a person who was before not in the situation of a tenant to him, for the rent of £100, it appears to me there was nothing to prevent his letting to the old tenant at the rent of £100, and the question would be, Whether that was the best rent that could be got therefor?

"My Lords, there is another question, which has arisen in this case, upon which I shall not trouble your Lordships by saying more than simply to state my opinion upon it, namely, it is said if all these objections could be sustained, still these are leases within the statute of the 10th George III. Now, my humble opinion upon that is, that these are not leases protected by that statute. Opinion on the statute.

"Having stated that I do not think the objection of grassum arises here, or that the statute will protect the leases if they are contrary to the power, and having stated that, in my judgment, this is a positive restriction or prohibition, the question, therefore, that is now to be decided, I apprehend to be, Whether this case has been properly decided in the Court below? Whether, upon the grounds on which it acted, they ought to have altogether assoilzied the defenders? And that, I apprehend, may be put in another shape, namely, Whether the pursuer has stated such a case upon his summons, and whether the circumstances and facts upon which the Court have proceeded are such, in their nature, that, without farther inquiry or investigation, they ought to have assoilzied the defendants altogether?

My Lords, having intimated that, I think your Lordships will perceive that, in my judgment, the pursuer has a very difficult case to establish, I cannot go the length of saying, that, as far as I have been able, with a diligent attention to the case, I have convinced myself that it has hitherto been before the Court with all the information which may be necessary in order to determine, and, particularly, to determine for the first time, a cause of such

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infinite importance to the landed interest of Scotland, as I conceive this to be. I shall, therefore, proceed to state to your Lordships the effect of the summons again.

The summons then proceeds to state the manner in which the Duke of Queensberry let; that is, it asserts that, 'by thus letting 'new leases of the lands in question, several years before the ex- 'piry of the old ones, to the tenants then occupying the lands, 'all competition whatever was completely excluded, and it was 'absolutely impossible, in such a case, that the lands could be let 'at the best rents that might have been got for the same, as no 'stranger could possibly compete with the tenant of the farm, who 'had, in many cases, six or eight years of his former lease yet to 'run, and in some cases, even a longer period. The landlord, in 'acquiring his object of an increase of rental long before the ex- 'piry of the existing leases, was evidently acting at the mercy of 'the tenant possessing at the time, who would certainly take care 'that, in estimating the rent to be paid by him, upon his new 'lease, he should be amply paid and compensated for the unex- 'pired term of his former one.' Now, this general reasoning may be extremely good, but it is by no means conclusive, because, if the landlord was at liberty to take a renunciation of the lease,—and the landlord being at liberty to take a renunciation of the lease if he could have let to a stranger, provided he has let to the old tenant at the same rent at which he could have let to a stranger, all this would fall to the ground; but, I am by no means prepared to say that it would follow of course, if he took a less rent from the old tenant than from a stranger, therefore the lease ought to be avoided, because there may be a great many considerations which ought to induce a tenant in tail, even if you clothe him with the character with which it has been supposed this House has clothed him, rather more than they ever have, I mean that of the administrator of a trust estate, there may be many cases, in which it would be a better execution of the trust to prefer old tenants, connected with the family and estate, at some abatement of rent, than to take an increase from a stranger. It is therefore a circumstance, and but a circumstance, to be attended to. Then it states, 'that in all these cases there was absolutely a 'grassum paid by the tenant.'

"I have before stated to your Lordships, and I do not mean to go into it again, that in my judgment this is not a grassum; for it cannot be disputed that the unexpired terms of these highly valuable leases were in every case worth a specific sum of money. That specific sum of money, is a sum of money which is paid as rent; and, I think, the late Duke of Queensberry cannot be said to have taken grassums while these leases were in existence, and the Marquis of Queensberry will have the benefit of the increased rent. 'That, in this manner, the deceased William, Duke of

'Queensberry, in contravention of the said deed of entail, and to 'the manifest defraud, hurt, and prejudice of the pursuer, and 'the heirs of entail succeeding to him in the said tailzied lands 'and estates, let leases of the lands and farms under written, for 'periods of nineteen years, each commencing at the different 'terms underwritten, upon renunciations of the unexpired terms 'or periods of the former leases.'

"My Lords, in a subsequent part of this summons, after enumerating various leases, it is stated, 'That by this mode adopted by 'the late Duke, for the sake of present profit to himself, of letting 'the lands anew to the tenants then possessing the same, for the 'full term of years authorised by the entail, several, and, in a 'number of cases, many years before the expiry of the then 'existing leases, upon the tenants renouncing the unexpired period 'of these leases, in consequence of which, the leases were let at 'most inadequate rents.' Now, here is an allegation in this summons, that the leases were let at most inadequate rents, and an allegation that they were let at most inadequate rents for the purpose of his making a profit to himself; and this allegation appears to me to be very material.

It then proceeds to state the law of Scotland as to the right to recover damages, in consequence of having let such leases as these, and then, my Lords, it seeks the payment of those damages on a ratio of calculation, which, I understand by Mr Clerk, is not to bind him to have the damages in that form; but it is a mode of calculation which the Court might, if they thought it not the right mode, alter and vary, or reject, if damages were due.

Opinion on respondents' defences.

I beg now to call your Lordships' attention to the strict *intention*, whatever may be the meaning of the words, strictly speaking. The first defence is, 'That many of the leases of which the pursuer 'complains, that the renunciations were taken, would not naturally 'have expired until some years hence; and had they not been 'renounced, the Marquis would have been receiving lower rents 'than he does at present. If it were to be held that the late 'Duke of Queensberry was not entitled to put an end to the former 'leases, by accepting of renunciations, and if the executors of the 'late Duke could be found, upon that account, liable in damages, 'these damages would not be due until the periods shall arrive 'when the former leases would have expired, and could only be 'claimed by the heir in possession. The pursuer, the present 'Marquis of Queensberry, may then be dead, and a different heir 'of entail possessed of the estate; and as it would only be the 'heir of entail in possession at the time, who would be entitled to 'claim the damages, if any could be due; therefore, in all those 'cases where the natural expiration of the former leases has not 'yet arrived, it is incompetent for the present Marquis to proceed 'in the action.' Now, that defence your Lordships see, is founded

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in matter of law. If the Marquis could not bring his action till the former leases had expired, then the defence is perfectly relevant. There is no fact to be tried in that case on that part of the defences. The defence would be perfectly relevant, and it would be a bar in that way of putting it, if, by the Scotch law, he could not maintain his action at this time; it would be of no consequence whatever, and would be irrelevant to prove that these leases had been let at an undervalue.

The next article in the defence is, 'But, independently of this 'objection, the defenders plead that the claim of damages, in all 'the cases, and, in any event, is totally groundless. The late 'Duke of Queensberry never contravened the entail of the Tin- 'wald estate, referred to in the summons, as he neither let any 'part of this estate for a longer period than permitted by the 'entail, nor took grassums.' Now, my Lords, admitting this to be so—admitting for the moment that he did not let any part of this estate for a longer period than permitted by the entail, and admitting that he did not take grassums, is this, therefore, a complete defence to this action? This action proceeds, not merely upon the circumstance that he took grassums; but, supposing them to fail in proving that he took grassums, it does not proceed on the circumstance that he let no part of the estate for a longer period than permitted by the entail, because that only goes to show that the period of duration of the leases was according to the entail; but the question raised by this summons is,—Supposing he took no grassums, and that he did not let for a longer period than permitted by the entail, has he, in other respects, let according to the entail? Has he, or has he not, let for this permitted period, at such a rent as was not the reasonable and best rent that could be got for the same? It seems to me, therefore, that this defence cannot possibly be sustained.

Then follows the third defence: 'The whole estate was let by the 'valuation of a person of approved skill, at what was deemed an 'adequate rent, and the rental, so far from being diminished, was, 'at the death of the late Duke, increased to more than double 'of its amount at the time of his succession. Therefore, the 'defenders, his executors, ought to be assoilzied from the present 'action, and found entitled to expenses.' Now, this is a defence not founded in law, but in fact. That it was let by valuation, seems to be admitted on all hands. That it was let by the valuation of a person of approved skill, is a circumstance of fact which will amount to considerable evidence, that it was let for the best rent that could be got therefor; but whether the person who made the valuation was such a person, is matter of fact to be proved, unless it is admitted; and it is matter of fact to be proved, that it was let at an adequate rent. Possibly, one might venture to add, that if it was let by the valuation of a person of approved

skill, at what he deemed an adequate rent, the Court would take for granted, that there had been inquiry made to enable him to exercise that skill, unless it was shown there was gross and culpable neglect in the manner of estimating it. 'The rental, so 'far from being diminished, was, at the death of the late Duke, 'increased to more than double its amount at the time of his suc-'cession;' which appears certainly to be admitted in the papers; but the manner of recovering that amount, may leave open a question to be decided on sound principles, when you look at all these leases, which form a constituent part of the whole lettings, whether the doubling the rent was not reserving on each lease the best rent that could be got therefor? That question, therefore, is left open.

"My Lords, the first interlocutor, I observe, is that of my Lord Gillies, who stated himself thus:—'Having heard parties' 'procurators upon the grounds of the libel and defences: Finds 'that in those cases where renunciations were obtained by the 'late Duke of Queensberry, of the former leases, and new leases 'granted of the same lands for a longer endurance, but without 'any increase of rent, there is no room for an allegation, that a 'grassum was received by his Grace, or for a claim of damages 'upon that account.' Now, your Lordships will perceive that the humble individual now addressing you, does not agree with my Lord Gillies in this declaration in his first interlocutor, because, though I think there is not room for an allegation that a grassum was received, yet I do not agree that there is no room for a claim of damages, provided, that in a case where there was not an increase of rent, there might have been reasonably obtained a reasonable increase of rent, because, if there be a prohibition to let, except for the best rent that could be got therefor, letting at the old rent may be of itself a circumstance of evidence. It would be so in our Courts, to show that it was not letting at the best rent you could get at the time, and, therefore, that taking no increase of rent, though it will not negative the fact that you did let for the best rent, will not conclusively prove and establish that fact.

Then the judge goes on to say:—'But finds that, in all cases 'where, upon obtaining renunciations of current leases, the Duke 'let the lands of new, to the same tenants, for increased rents, 'the renunciation with the additional rent thus obtained under 'the new leases, is to be considered as a grassum paid to his 'Grace.' And your Lordships will recollect Mr Clerk, who argued this case very ably at the bar, stated, you are not to consider merely the renunciations and the letting to a tenant, but to look at this (and most truly and justly he so stated it), as a complicated case. That is, a renunciation by the old tenant letting to a new one; and, in the nature of the thing, there must have been something in the nature of an agreement by the old tenant

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giving up the remainder of a term at a less rent, and beginning with a new one, with an increased rent; and in that way of putting it, he argued, that the heir of entail in possession has an advantage by reserving a benefit to himself, which the other heirs of entail would not enjoy. Some of them might not; but still, that all comes round to this—be it, if you please, a complicated question, I think if he was entitled to take a renunciation of a lease from A. and let it to B. at £100 a year, and if you could not insist that the rent that B. was to pay, was not within the words of this power, 'the best rent that could be got for the same,' it would be impossible, for these reasons, to say it was not the best when paid by A. If that was the best rent that could be got therefor, it is impossible to say, it was not the best when paid by A, because very often, Who is the tenant? is a question of as great importance as to what is the best rent.

"Then his Lordship went on to state, 'That the nature of the 'transaction, in such cases, affords real evidence that the Duke 'did not, as enjoined by the entail, set the said lands and estate 'at such reasonable rents as could be got therefor, and, therefore, 'finds damages due to the pursuer, and decerns.' Now, if by that had been meant that the nature of the transaction, in such case, affords evidence to be considered, I agree with him, but if it is to be said that the nature of the transaction in such case affords conclusive evidence, then I cannot agree with him. 'And, 'before answer, as to the quantum of damages, ordains the pur-'suer to give in a special condescendence of the damages claimed 'by him, and for what leases and lands.' My Lords, both parties were dissatisfied with this interlocutor, and gave in representations against it, and then my Lord Gillies, 'Having considered this re-'presentation, with the answers thereto, before answer, ordains 'the pursuer to give in a special condescendence, in terms of the 'Act of Sederunt, specifying the different leases granted by the 'late Duke of Queensberry, on account of which he now claims 'damages, and the facts and circumstances relative to each, which 'he avers and undertakes to prove;' and then he subjoins a note, which bears upon the language of his first interlocutor, and which is expressed in these terms:—'The Lord Ordinary still remains 'of the opinion expressed in his last interlocutor, viz., that in the 'cases there mentioned, the renunciation with the additional rent 'must be held to be truly a grassum, and that these circumstances 'do at any rate afford real evidence that the lands were not let, 'by the renewed leases, at such reasonable rents as could have 'been obtained therefor. But, by the above interlocutor, all this, 'in the meantime, is left open, in order that, before the cause is 'carried into the Inner House, the facts relative to it may be 'fully ascertained, and particularly, an opportunity afforded to 'the pursuer, on the one hand, of proving his allegation, that by

'the renewed leases, the lands were let greatly below their value; 'and to the defenders, on the other hand, of proving what is so 'strongly insisted on in their representation, that all the lands 'were, by the renewed leases, let at reasonable and adequate 'rents.' So that your Lordships observe, that the determination with respect to the finding, that the nature of the transaction afforded real evidence that the Duke did not, as enjoined by the entail, let the lands at reasonable rents, is now followed by a direction to the pursuer, 'to prove his allegation, that by the renewed 'leases, the lands were let greatly below their value;' so that the Court might have before it, not only the effect of what is called real evidence, but the evidence which should arise from the proof of that allegation; and to the defenders, on the other hand, of proving what is so strongly insisted on in their representation, that all the lands were, by the renewed leases, let at reasonable and adequate rents. My Lords, that condescendence was then given in, and it appears material now to call your Lordships' attention to this sentence. It is in these words—as much of it, at least, as it is necessary to state, is in these words,—'In obedience to 'the Lord Ordinary's interlocutor, the pursuer condescends upon, 'and offers to prove the following facts and circumstances, in 'relation to the undermentioned farms and possessions, which he 'shall endeavour to state as succinctly as possible, observing the 'same order in which the different farms are specified in the 'summons, upon which the action is founded.' He begins with 'the old Mains of Tinwald, and the farm of Tinwald.' This farm, he says, was let to Mr Staig for nineteen years, from Whitsunday 1796, at £140 of yearly rent. In 1799, he renounced this lease, and obtained a new one from Whitsunday 1799, at the same rent, though, at this very time, he was receiving from Messrs Smith, his subtenants, £330. The real value of the farm at the period when the renewal was granted, was about £550. My Lords, with respect to this lease, the old lease would not have expired till the year 1815, which was three years after this action was commenced; but, for the sake of illustration, I will suppose that this was a lease subsisting at the time the present Marquis became the heir in possession, and subsisting after the renunciation of a former lease, which would at that time have expired; and then the circumstances come to be material in this way. The rent, in 1796, which was for a lease of nineteen years, was £140 yearly rent. The rent reserved in 1799 for nineteen years (that was a prolongation of the term for three years), was at the same rent, and, unquestionably, it might be the best rent that could be reasonably obtained. It is stated, that the real value of the farm was about £550. Now, it is a little difficult precisely to know what these words in this condescendence, 'the real value of the 'farm,' mean. If it means that the rent that could have been

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reasonably obtained, was £550, it would have been better, I think, that it should have been so stated, because if it had been an allegation that that rent could have been reasonably obtained, and yet that the rent was only £140, it would be very difficult, in the consideration of such a power as this, to say that that was not a circumstance which it was necessary to account for how it happened; so it is another circumstance in this part of the case that is material, namely, that at this very time the tenant who paid £140 a year was receiving from his subtenant (which means persons in the obvious possession of this estate), no less than £330. That is a circumstances which, though I do not mean to say, after inquiry, it will be conclusive, but, in the discussion of such a question in our Courts, as to whether the estate had been let for the best rent that could be obtained, there would be circumstances which, if proved, would be of very considerable weight for the consideration of a jury.

"My Lords, the next which is stated is 'Trohoughton,' which was let in 1797, at £100,—lease renounced in 1800, sixteen years of it being then unexpired; and new leases granted at £110; real value at that period is said to be £147, 7s. Now, my Lords, the circumstances of this case (after first observing that this was not expired), there is a very great difference, indeed, between propounding a case, as a case where the best rent was not reserved; and I would say, once for all, that by 'the best rent,' I do not mean a rent that could be got for the first year, but the most reasonable rent, which, as a rent of nineteen years, ought to be considered the best and most reasonable rent throughout the whole nineteen years; because the case may very easily happen, and often happens, where, if you take £550 for the first year, and that rent is to be continued, instead of letting at the best rent, you run a considerable risk of getting no rent at all for many years; and it would be the best rent, in the true sense of the words, and the most reasonable, to take £250 for the whole nineteen years, than to take £550 for the whole nineteen years, because you might not get it every year: and I have selected these two first cases for the sake of observing (if I understand what the law of England is on this subject), that if I sat at *Nisi Prius*, and were to direct a jury on such a subject, I should say, that if the words mean that a reasonable rent for the nineteen years could have been got, amounting to £550, and if you are convinced that the estate was sublet at £330, it is, upon this view of things, impossible to make out that £150 was the best rent, because the difference between £550 and £150, is immense; but, with respect to the other lease, where the £110 is reserved, and the allegation is, that the value is £147, 7s., if it means such a sum as would be got at auction, there is hardly evidence worth consideration; and the difference between £147, 7s. and £110, is not so considerable as almost to

be sufficient to run the risk of a miscarriage of justice, in a question of so much difficulty as this; and I make the observation, because it has been observed by a noble Lord at the table, that it would be desirable to confine a further inquiry to some leases, instead of extending it to all of them, though it is difficult to say how that can be done, if these words, 'real value,' are meant to hold out this idea of reasonable rent. If the real value is to be considered reasonable rent, I most fully adopt the doctrine stated in that case in the Court of King's Bench, that it must not be established merely that such a rent could be got, and might have been taken, but there must be some unfairness, some fraud, and some gross culpable negligence operating as mischievously as fraud would operate, before you can undertake to say, leases of this sort should be set aside. Making that observation, and suffering it to be applied to two of these leases, it is next to impossible to say there are not some others to which it does not apply. I have selected these two for illustration, and considering them contrary to the fact, as leases where the former leases would have expired, to explain what has occurred to me on the subject. There was one let in 1791, at £47,—valued by Mr Alexander, in 1801, at £58, and I mark that circumstance, because, in the condescendence, they remark on it. Supposing the two first leases renounced had expired, the whole that relates to Mr Alexander's valuation, would have no application to them, because they were renounced before he valued them. The lease renounced in 1807, three years of it being then unexpired, and new lease then granted for ten years, equal to nineteen years, from 1804, at £60, being £2 above the valuation of 1801,—real value at that period, £152, 15s. Now, here is a case not like the second case, where there was nothing alleged in the condescendence, except that a lease had been granted at £110, and what is called the real value, might be £147, but here is a complicated case, in which there is not only a difference between £150 and £60, but where the £60 being reserved during the subsistence of the lease, which was let at £47, a great deal less than half the estate had been subset to a tenant at £45. All this may be accounted for, I have no doubt. It is very easy to suppose circumstances accounting for it; but the question is, Whether it is or is not to be accounted for? There are five or six other cases of subsetting, and cases having circumstances of distinction, which do not belong to the generality of these leases.

Fraud or culpable negligence necessary.

" My Lords, after this condescendence was given, there was, as is usual, an answer to the condescendence, which is in these words: 'In the condescendence, the noble pursuer gives a sepa-
' rate view of each farm on account of which damages are claimed,
' 1st, The rent at which it was let before the present lease was
' granted. 2dly, The time when the former lease would naturally

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'have expired. 3dly, The valuation put upon the farm by Mr 'Alexander. 4thly, The rent at which it was re-let by the late 'Duke;' and then there is the fifth, which seems to put a natural construction upon the pursuer's words, the *real value;* '5thly, The 'rent which he avers it was worth at the time it was re-let. As 'to the four first of these particulars, the condescendence, so far as 'the respondents have observed, is correct. The fifth, they hold 'to be irrelevant, for reasons stated in a minute given in for them 'of this date; but, on the point that the rents stipulated by the 'present leases were reasonable, they aver, and it will appear 'from the deposition of Mr Alexander, which was taken by the 'authority of your Lordships, and remains at present sealed up. '1stly, That he was a person much employed in valuing land, not 'only in the county of Tweeddale, where he resides, but in many 'other counties. 2dly, That he was applied to by the Duke's 'agent to value the estates belonging to his Grace, in Dumfries-'shire, and particularly the Tinwald estate. 3dly, That he was 'instructed, in doing so, to specify what, in his opinion, would be a 'fair rent for each farm, supposing that it had been at the moment 'out of lease. 4thly, That he, accordingly, inspected all the farms 'carefully, and endeavoured to make himself master of every cir-'cumstance of local situation, markets, distance from manure, &c., 'which could affect their value to a tenant. That after obtaining 'this information, he affixed such a rent on each, as, to the best of 'his judgment, was fair and adequate.' Then follows this, which is certainly a most material allegation, 'that the rent so fixed was 'calculated on the supposition that the current lease had been at 'an end, and the farm open for being re-let. If these four allegations were proved, it appears to me, I own, to be one of the most dangerous things possible, to say, that a tenant for life (I speak now of English tenants for life), that a tenant for life is in the execution of a power to be placed in this situation, that if he employs a man of real skill to inform him what is his duty to himself and those who are to come after him, with respect to letting his lands, or, to put it still more strongly, in the case of those who have the peculiar protection of the law-trustees; and if you please, to clothe an heir in tail with the character of an administrator, or trustee (a coat which has been oftener put on his back elsewhere than it has here), I say, in that case, which has the peculiar protection of all the Courts, if these circumstances were proved, I really do not know in what situation of safety, and in what situation otherwise than that of the utmost peril and danger, such a tenant for life would be, if that conduct is not to protect him in a question, whether he has let for a reasonable rent, or in what situation the trustee would be, if, in such a case, damages could be recovered, or it could be said he was guilty of a breach of trust; but, then, general allegations of this sort must always be considered with

reference to the actual circumstance, without meaning to say that it really makes a material difference. Nobody can deny it may make a most material difference, whether, in 1801, I let upon the valuation of Mr Alexander, or do not act on it with respect to many parts of the estate (and that appears to be the case here) till 1808 or 1809, because Mr Alexander's valuation in 1801 may be a valuation he would not abide by in 1809, though he thought it most prudent in 1801. So, it may be a matter of considerable importance, whether the Duke of Queensberry, or Mr Alexander, did or did not know of the circumstances of all these subsettings. If a person, in the exercise of such a power as this, goes to work with that ordinary prudence, and makes those reasonable inquiries (which are deemed reasonable, because they are necessary), and if he is misled, the case is treated with great indulgence; but, if you can establish that I, a tenant for life, am letting a lease for twenty-one years, at £100 a year, and that I know that my tenant, to whom I am letting at £100 a year, is letting it for £500 a year, if I cannot account for the circumstance of letting him have it at £100 a year (a circumstance which might, in some cases, be accounted for, though it is difficult to say what are those cases), I say, if I did not account for that, then it might be fairly taken to be dealing with that sort of partiality to the tenant which I have no right to indulge at the expense of those who are to take after me.

"The matter then comes before the Court after petitions and answer. There are petitions on your Lordships' table, certainly not more than so important a question requires; but, before I state the interlocutor, it is proper to state, that these answers having been put in, my Lord Ordinary states, in another interlocutor of the 14th June 1814, 'The Lord Ordinary having advised the 'condescendence for the Marquis of Queensberry, with the answers 'thereto, and relative minute, Allows the pursuer a proof of the 'facts stated in the condescendence, and the defenders a proof of 'the facts stated in the answers, and to both parties a conjunct 'probation thereanent.' My Lords, the respondents reclaimed to the Court against this interlocutor, 'and the Lords having resumed 'consideration of this petition, and advised the same, with the 'answers thereto, they alter the Lord Ordinary's interlocutor 'reclaimed against: Sustain the defences, assoilzie the defenders 'from the conclusions of the libel, and decern; but find the pur-'suer not liable in the expenses of process.' They reviewed that interlocutor, and upon the review, namely, on the 15th November, the appellant reclaimed against this interlocutor, first, by a short, and afterwards by an additional petition, but on advising these with answers for the respondents, the Court, of this date, 'unanimously refused the desire of the petitions, and adhered to 'their former interlocutor.'

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"Now, my Lords, I have, perhaps from ignorance (very likely indeed) of the strict nature of the forms of proceeding, found some difficulty in precisely understanding what this interlocutor is. It uses the same words as the Lord Ordinary's interlocutor of 'sustaining the defences.' If by that is meant, that on looking at the summons, and what is strictly called the defences, they thought it right to assoilzie the defendant in the conclusions of the libel, it seems to me difficult to sustain the judgment so understood, because your Lordships will recollect that the defences are threefold,—one with respect to leases, where the former renounced leases had not expired,—the next is, that the land was not let for a longer period than was permitted, neither of which positions or propositions affect the leases which had been granted upon the renunciation of leases that had not expired before the summons, nor do they affect leases not indeed granted on grassums—not granted for a longer period than nineteen years—but leases, if any such there be, as upon a fair view, and a just application of principles, cannot be considered as not let at the best rent that could be got for the same. Then, with respect to the third allegation, it is a pure allegation of fact, and without any proof of the truth of which allegation, in a mode of proceeding more familiar in Scotland than in England, they have been taking for granted all this is proved,—that all this is admitted, a great part of which is not proved or admitted, and as Mr Clerk justly observed, they have been arguing from what is in the dark,—they have been arguing from what is sealed up, as if every body had read it before it was put into the envelope. If, therefore, it means merely the defences, independent of the condescendence, it does not appear to me it can be sustained. If the Court mean to say—'Looking at your summons and the defences, 'and looking to the condescendence, we are of opinion, that if 'the condescendence was to be taken to be proved, you have no 'case.' If that is the meaning of it, then I dare say it has been very inaptly expressed in the interlocutor, because I have not the presumption to say, I can understand this language as well as those who framed it; but it would have been expressed in a way we should better understand here, if the interlocutor had stated that, 'giving you credit for everything you state in your con-'descendence, still you cannot sustain your action, and we will 'not put you to the proof of your condescendence, much less put 'the defender to the proof of the allegations in his answer, be-'cause we are of opinion, that if you proved every syllable men-'tioned, still you have not supported your summons.' My Lords, we must take it in the one way or the other. If we are to take it as a case which has been decided upon the defences merely, then it appears to me, that taking the summons and the defences together, and taking the summons to have intimated fraud in respect to the Duke's endeavour to take a profit to himself at the

expense of the heir of entail, the question will be, Whether the defences meet that case?—if these allegations are to be understood to be, that with that view he did not take a reasonable rent. On the other hand, giving credit in the nature of a demurrer to every syllable, you have not in that condescendence stated a case that entitles you to damages. My Lords, we have the case before us, with a condescendence. In my humble opinion, if the case is to be taken only on the defences, I mean by that, in the strict sense of the word 'defences,' in the same sense as Lord Gillies uses it, it does not appear to me, that those defences, whatever the nature of the case may be, sufficiently meet it; because the first does not apply to many of the leases; the second, though it applies to all, is not sufficient to bar the action as to any of the leases; and the third reason is a reason of fact entirely, which should be proved or admitted; and if it was shown to be proved or admitted, yet though it is a fact most material in the case, and which goes ninety-nine times in a hundred to conclude such a case (in England I mean), and for the sake of security, it should be adopted in Scotland.

"My Lords, there is another difficulty which has occurred to me, that, supposing this interlocutor in either way understood, as an interlocutor which could be sustained, as to a great majority of those leases, and (if I am to speak, if it were fit to use such an expression as *judicial conjecture*) judicially conjecturing, I think, the greater part of the leases will never be effectually touched; and yet, on the other hand, it is impossible for me, according to the principles which have governed my mind, borrowed from English cases, to say that, with respect to some of those leases, farther consideration is not due. The circumstance of a lease granted in 1808, on a valuation made in 1801, with an interim demise. My Lords, I always feel most grateful for a shake of the head; but if you will look at the lease 1787 (1797?), for instance, you will find that it was valued in 1801, that the lease was not renounced till 1807, that is six years; and there is the same circumstance as to others, and connected with subsetting in the meantime. I am very far from saying, that with respect to such a lease in that view, that could be touched, provided there was a due dealing with respect to it, which will keep the case within the principles laid down in the King's bench, in the case cited at the bar, which appear to me to be true principles. Lord Gillies, I think, did more than what has been done in this condescendence, because he says, 'In specifying the different leases granted by the late Duke 'of Queensberry, on account of which he now claims damages, 'and the facts and circumstances relative to each, which he avers, 'and undertakes to prove in support of his claim.' It would have been a very material thing, with respect to some leases, to have added many circumstances to show that those leases, where there

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have been all those sub-settings, could be leases fairly granted. It was on the pursuer, I admit,—to make his condescendence clear, to make his condescendence sufficient. But there is this difficulty first in the case,—*first, non constat*, that the Court has decided on the condescendence. In the *next* place, this condescendence leaves me in a state as to some of the leases, in which, though I may know what to do with them, with respect to others, I do not know what to do with them; and, therefore, it is a case of the most anxious consideration, and a case which, if it stood by itself, and was not to form a precedent, as I think it will, of the very highest importance with respect to landed property in Scotland,—a question of immense consequence to the heir in tail in possession; because, if this action can be sustained, and this tailzie had been recorded, any one of those leases might have amounted to a contravention that would have created a forfeiture of the lease.

"It has appeared to me, on a most anxious attention to the case, and I will persume to say a most careful attention, regarding it as a case to form a precedent of such infinite value to that part of the kingdom, on the best consideration, I think, the proposition I shall submit to your Lordships (because I think it may be useful not to submit, though to throw out the general nature of that proposition till Wednesday next), but the general nature of it would be of this kind, namely, to *affirm* the interlocutor, so far as it affects leases, with respect to which the Marquis of Queensberry had no cause of action at the time he brought an action into Court. With respect to the other leases to send it back to the Court, to review the interlocutor, and with leave to the pursuer to propose to the Court an additional condescendence, if he thinks proper.

"I believe something of that kind will enable your Lordships finally to do that justice in the case which you can safely believe to be justice; and I do profess, either affirming it generally, or reversing this interlocutor generally, would appear to me a proceeding that would leave the law, on this most important subject (a law, the benefit of which is so seldom attainable in this country and on just and right principles, so seldom attainable in this country) —it would leave it in such a state of uncertainty, that it seems to me, that not only with respect to these parties (because the Marquis might institute another action, with respect to the leases, where the former leases were not expired at the time of the summons), but with respect to all other persons—tenants in possession—tenants in tail—and the occupiers of all other landed property; it would leave them open to such inconvenience, if damages are to be considered as recoverable in such a state of the case, that it must be necessary that something should be done to extricate them from it. I have thrown out, generally, the grounds

which have led me to this view of the case, meaning to consider again the nature of the proposition I have alluded to, in order to have an opportunity to farther consider it, praying of your Lordships a delay till Wednesday."

LORD REDESDALE said,*

"My Lords,

"This is a question of so much importance, that I shall humbly submit to your Lordships a few words upon it. In the *first* place, I wish to put out of my consideration the question, Whether these leases are sustained by the statute? If I rightly read the statute, it meant to prevent the granting of leases upon the surrender of the former lease; for, otherwise, the provision of the statute, that no lease shall be granted unless the former lease shall be expired, or within a year of expiry, is nugatory. If a surrender may be made, there may be twenty years to come of the existing lease, and that provision in the statute would be totally defeated. That is the impression on my mind; but, I apprehend, that the construction of this statute is not properly a question within the pleadings in this cause. It makes no part of the defence; the leases are not attempted to be supported in the defences, upon the ground of the statute. Whether the subsequent proceedings properly let the parties into that consideration, I cannot pretend, from any knowledge I have upon the subject, to say; but, unless that is the case, it seems to me clear that that is no part of the question in this cause.

"With respect to what is an important question in this cause, so far as it concerns not only the parties, but all other persons who are interested in entailed estates in Scotland, I think it very important to consider what is the nature of the prohibition contained in the deed of entail, and what is the nature of that power which is annexed to the prohibition to grant certain leases. I apprehend, according to the law of Scotland, the prohibition itself is to be construed most strictly; and you are not to consider that prohibition as going one jot further than the precise words in the prohibition; but, with respect to the power, that it ought to be construed liberally, and that you are to consider it as a restriction of the extent of the prohibition, intended for the benefit of those who, from time to time, should be in possession of the estate. Unless it is so construed, it seems to me that the situation of every person in the possession of an entailed estate in Scotland, where there is a prohibition against granting leases, must be extremely hazardous; for, if the full value for which the land might be let, is not reserved upon the lease, the heir of entail who is in possession, is to be liable to an action for damages for granting that lease; or, if his lease can be avoided, the entail being recorded,

* Mr Gurney's short-hand notes, revised by his Lordship.

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he is to be liable to an action from the tenant for having granted a lease that cannot be sustained, the situation of every heir must be extremely hazardous, unless he thinks proper to let the lands in a way extremely injurious to enjoyment of property of that description in Scotland, and injurious also to the public.

"The words of this entail are not exactly what the summons attempts to interpret them. The words are 'To set the lands for 'such *reasonable rents* as could be got therefor.' The summons takes these words to be (in other words), for the *best rent* that can be got therefor. I cannot give that construction. I think the words, 'for such reasonable rents as could be got therefor,' do not amount to words of the same strictness as the words, 'for the '*best rents* that could be got therefor;' and that all the circumstances under which a person of the description of the heir of this large property might, with propriety, think fit to let his estates, are to be taken into consideration.

"I do not apprehend that it could be the intent of the person who was the creator of this entail, to put the persons who were to succeed to the entail into a situation which he would not have acted upon himself. Could the late Duke of Queensberry, when he came into possession of the estate, and with the influence that belongs to such a property, have had the idea of exacting, or have wished to exact, the most rent that could be got? I apprehend that cannot be the construction which ought to be given to such a power as is contained in this instrument. I take it that the power to grant leases is given for these reasons,—that the estate may be let to respectable and responsible tenants, and be occupied by respectable and responsible tenants; that it may be let with a view to future improvement by such tenants, and, because persons who hold only from year to year, lands that are capable of improvement, will not improve, from the uncertainty of their tenure; therefore, the consideration, what is reasonable rent to be taken under such circumstances, is a consideration of difficulty. Unless the person who has the enjoyment of the estate, and has the power to grant those leases, is to be considered as giving beneficial leases to the tenants, and to be at liberty to give such beneficial leases as should induce good tenants to offer for the estate, and such as should induce the tenants to improve the estate in their hands, and to look to the person who should grant the leases as a benefactor. That is the idea which, I believe, has generally been considered as influencing the decision of questions of this nature, in this country, and such, I think, must have been the intention of the creator of this entail. Therefore, I cannot conceive that the interpretation that has been given in this summons to the words which are used in the clause in the entail, is a right interpretation, supposing these words, 'for the *best rent* 'that could be got therefor,' are to be interpreted strictly or in

any other sense than the words actually used, 'at such reasonable 'rents as could be got therefor.' I therefore conceive, that, looking to this case, we ought to consider it as a case in which the person who granted the leases in question, was at liberty to act with considerable liberality to the persons who were to be tenants of the estate.

"Upon the proceeding itself, the summons goes upon this ground, that these leases were let in contravention of the deed of entail, and to the manifest defraud, hurt, and prejudice of the heirs; that is, that the person who granted these leases, did, by this act, defraud. Now, my Lords, fraud must be accompanied with *intention*, and he must *mean* to defraud. A man cannot be said to defraud another, who does not mean to defraud him. In the subsequent proceedings, that is more distinctly stated, but in the summons itself it is also stated, that what was done by the Duke of Queensberry, was done by him for the sake of present profit to himself, and to the prejudice, therefore, of the heir, with a view to that present profit, and so far it must be considered as in the nature of an *intention* to commit fraud; but that I take to be the very gite of this action, and that there was a view to defraud the succeeding heir. My Lords, the defences that are made, have been observed upon by the noble Lord who has already addressed you, and I will only further observe that, with respect to the second, it does not truly state the subject which is in issue, for it merely asserts, that the leases were not made for any longer period than is permitted by the entail, and that grassums were not taken—both of which statements are certainly true; but they do not meet the case made by the summons, namely, that the leases were granted with a view to the personal profit of the Duke, to defraud the succeeding heir of entail. The *third*, as the noble Lord has justly observed, puts matter in issue which is necessarily the subject of proof, namely, 'that the whole of the 'estate was let by the valuation of a person of approved skill at 'what was deemed an adequate rent.' That is a fact to be tried; and the proceeding which had been taken for this purpose by the Lord Ordinary was to try that fact. But, the decision which has been finally made, has been to shut out all trial of any fact whatsoever. The Lord Ordinary having conceived that it was fit that the circumstances attending these different leases, and the grounds upon which the Marquis of Queensberry made objection to them, should be put in a course of trial, that the facts should be ascertained by evidence on his part, and should be met by evidence on the other part; he, therefore, authorised the Marquis to give in a condescendence of what he would prove with respect to the different leases. Whether that goes as far as Lord Gillies intended it should go, may be questioned; but the Marquis put in a condescendence which does not state certain facts from which certain

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inferences might be possibly drawn, which might tend to impeach the leases. Those facts, and the inferences that might be drawn from them, have been also particularly stated to you by the noble Lord. But, what is the answer to the condescendence? It observes, that in the condescendence these things are stated, 1st, The rent at which each farm was let before the present lease was granted; 2dly, The time when the former lease would actually have expired; 3dly, The valuation put on the farm by Mr Alexander; 4thly, The rent at which it was relet by the late Duke; and 5thly, The rent which the Marquis avers it was worth at the time it was relet. As to the four first of these particulars, the condescendence is admitted to be correct, that is, it is admitted that these farms being let at certain rents, the former leases were surrendered before their natural expiration, and, in many instances, a considerable time before their natural expiration; and that a valuation having been put on each farm by Mr Alexander, the rent at which it was relet by the late Duke, was correctly expressed in the condescendence.

If we take some of these circumstances, is there no ground whatever for inference from them? The noble and learned Lord who has already addressed your Lordships, has stated what in his mind might afford considerable ground for inference, which, as a question of fact, would be left to the consideration of a jury. If such evidence had been offered here on such a trial, it would be for the jury to consider whether these circumstances were of themselves sufficient to draw an inference prejudicial to the leases. Whether they are or are not sufficient, is a question that would, perhaps, deserve very great consideration in some of those cases; in others, perhaps they would afford very little ground of complaint.

"With respect to the fifth, that is, the rent which the Marquis avers each farm was *worth at the time, to be relet*, by which words he has interpreted the meaning of the words, 'real value,' and understood the words to mean what the farm was worth to be let at the time it was let. This the Court held to be irrelevant; but on the point that the rents stipulated by the present leases were reasonable, the respondents aver and assert, that it would appear from the deposition of Mr Alexander, which was taken by the authority of your Lordships, and remained sealed up, *first*, 'That 'he was a person much employed in valuing land; *secondly*, That 'he was applied to by the Duke's agent to value the estates be-'longing to his Grace, in Dumfriesshire, and particularly the Tin-'wald estate; *thirdly*, That he was instructed in doing so, to specify 'what, in his opinion, would be a fair rent for each farm, suppos-'ing that it had been at that moment out of lease; *fourthly*, That 'he accordingly inspected all the farms carefully, and endeavoured 'to make himself master of every circumstance of local situation,'

&c., and so on. This answer to the condescendence expressly puts in issue the points which are necessary, for the purpose of drawing from the whole the conclusion which ought to be drawn, and, perhaps, something more. 'Adverting to some special averments made as to particular farms, they say No. 1, the Duke or 'his agents were ignorant of the terms, or the existence of the 'subset here spoken of.' That is a matter which they put in issue, whether the Duke was or was not ignorant of that fact. If any pains had been taken for information on that, that must have been known to the Duke or his agents, and was a subject matter of proof, and properly a subject of proof for the purpose of determining whether that fact was or was not one which ought to weigh in the consideration of the case. With respect to other circumstances, they observe of the subsetting stated in the condescendence,—'That these farms are said to have been subset soon 'after the present leases were granted, either wholly or partially, 'at higher rents than were payable by the principal tenant. This 'is a fact of which the respondents know nothing, but it appears 'altogether irrelevant.' Is it absolutely irrelevant? It might be shown that, though in truth the subsetting was actually made at these higher rents, yet these higher rents were extravagantly given, or if not extravagantly given, the agents of the Duke, in granting the leases, were not aware they could be so subset, that Mr Alexander was not aware they could be so subset, and it might be shown that those higher rents that were given, were rents which could not be sustained. We well know that rents which have been agreed to be given by tenants, in various parts of the kingdom, are rents which cannot be sustained. I believe the noble Lord and myself are aware of that —that the rents which we let farms for, are rents which we cannot receive now from those farms. The question, therefore, is, whether, upon this condescendence and upon the answers supposing them to have been taken into the consideration of the Court of Session, there were or were not matters put in issue, which ought to have been the subject of evidence? But the Court proceeded in a way that seems to me to show, that they excluded, in their consideration of the condescendence, and the answers to the condescendence; that they conceived that the Lord Ordinary had done wrong in granting the condescendence; that his interlocutor, by which he allowed the appellant in this case to give in a condescendence, was an interlocutor which ought not to have been pronounced; for, if they had conceived that the Lord Ordinary had done right in granting this condescendence, and they had proceeded to consider the effect of the condescendence, and the effect of the answers to that condescendence, it seems to me impossible to say that there were not matters put in issue, the proof of which might materially affect this case, for if, in truth the lands

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were let, under all the circumstances which might be inferred from the condescendence, and which the answers to the condescendence agreed to be put in issue, were all really in evidence before the Court, then a different conclusion might have been drawn from that which has been drawn by the Court, in their final decision upon the subject; and, therefore, I think it must be conceded, that the Court has put out of its consideration everything alleged in the condescendence; and has proceeded upon this ground, that there was nothing shown which could sustain the action. I do not mean in the condescendence merely, but that nothing was shown in the proceeding, in the libel, and, in the defences, that put in issue a matter fit to be tried by evidence; and that the Court was competent to decide upon the case as it stood before them, and to decide that there was no ground for the action that was brought by the Marquis of Queensberry throughout. To that, my Lords, I cannot wholly accede. At the same time, I feel with the noble Lord, great difficulty in saying that any one of these leases can be finally impeached; but, I think, I am not prepared to say that no one of them can be finally impeached. I apprehend, that if it had been in the view of the Court below, that the condescendence had not expressed, with sufficient precision, the matter which ought to be in issue upon such a question, and that the answers to the condescendence did not supply that defect (those answers appearing to be to concede that the condescendence had put in issue matters that might be supposed to be strictly not put in issue by the condescendence), still the ordinary mode of proceeding would, I apprehend, be, by allowing the party to give in an additional condescendence, for the purpose of putting in issue the whole that ought to be put in issue, and be the subject of proof. If that be the proper way of considering this subject, then, as the noble Lord has stated, it seems to me, that with respect to the leases alluded to in the first defence, namely, those granted upon the renunciation of leases which would not have expired if they had not been renounced during the period before the commencement of this action, the Marquis of Queensberry could not say, at the time of bringing this action, he had sustained an injury, though he may now say he has sustained an injury by those leases; and, therefore, so far the Court has been right in sustaining the defence to that part of the action, and assoilzieing the defender from so much of it. With respect to the other leases, perhaps, the matter may be put into a better train for inquiry, and, therefore, it may be advisable to remit the cause to the Court below, with liberty for the party to give in an additional condescendence, if he should think fit so to do; or upon the condescendence, as given in, to allow of evidence upon the subject matter which is contained in that condescendence, so as to bring the question before the Court in a shape in which it can be determined with propriety, whether

the transaction of the Duke of Queensberry, in granting those leases, or any one of them (for that would be sufficient to prevent the general conclusion which has been drawn), whether the transaction has been such that it can be considered as a contravention of the power of leasing, in the true intent and meaning of this deed of entail?—That is, a fraudulent act of the Duke, for the purpose of injuring the succeeding heir, or from improper partiality to a tenant, without any particular view to defraud the heir, but with a view to benefit, improperly, the tenant in possession, by granting such a lease as he had no right to grant under such circumstances, and might, therefore, be responsible for any damage that might arise to the succeeding heir of entail from it. Without some case of that nature, it seems to me it may finally be impossible to sustain this action; but I do not conceive that the case is so fully before the Court, that this Court can now adopt the decision which has been made upon it by the Court below, namely, to say that there is nothing suggested, upon which this case should go to farther inquiry.

"My Lords, it is extremely important to consider this case in another point of view, which, I think, has not been adverted to. If the effect of the deed of entail is to prevent accepting a surrender of an existing lease, and granting a new lease without any regard to the former rent, what is the situation, and what was the situation in 1812, of the present Marquis of Queensberry, with respect to all the leases which have been granted? The Marquis of Queensberry must have been equally deprived of the possibility of accepting renunciations of any one of those leases; for the case amounts to this, that the Duke of Queensberry having once granted a lease, the Marquis must suffer that lease to expire, and cannot, during the continuance of that lease, accept of a surrender of that lease, and grant a new lease, unless in granting that new lease, he takes immediately all the benefit that may be derived from any improvements that the tenant may have made in the meantime; so that, at the time of granting the new lease, the property should be let at the full rent, which, with all the improvements of the tenant, the land was worth at that moment. My Lords, that will apply equally to the Marquis of Queensberry, if any of these leases of the Duke of Queensberry were in continuance at this moment. The Marquis could not take a surrender of any one of them, and grant a new lease; and that acts two ways—it operates with respect to the situation of the late Duke of Queensberry, and it operates with a view to the injury that the Marquis may allege he sustains by these leases, if he is right in contending that the Duke could not take a surrender, which, I think, must be sustained, for the purpose of this case. He is himself in that situation, and that situation is one of damage and injury to him, to the extent at which the land may be let under

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the present actual value. It is, therefore, a case, which in all its circumstances, is of an importance, that it is scarcely possible to conceive to what extent it may not be carried, and how far it may not render the situation of all persons in possession of entailed estates in Scotland, the most hazardous and inconvenient it is possible to conceive; and for that reason, if for no other, I should hold that the most strict construction is to be given of the prohibition in this deed of entail, and the most liberal construction to the words, which enable the granting of leases; and that it must be a clear case of fraudulent intent to deprive the heir of a fair advantage, which he otherwise might derive from the estate, that should avoid any lease of this description. I think it extremely difficult to hold, that a person who is in possession of an estate of this description, and which is subject to leases, should not be at liberty to accept of a surrender of the existing lease, and to grant a new lease, except upon terms which are equivalent to the full value of the land as it stood at the time of granting the new lease. When one recollects what is the beneficial way of managing an estate of this description as considered in Scotland. and that very often it is the object of a tenant in possession of an estate, to the close of his lease, to endeavour to draw out of the land all that he can, for the purpose of getting back to himself as much as he can of that which he has expended, in the meantime, in improvement, it is unquestionably, I believe, considered as often highly beneficial to the property before expiration of a term of this description, to accept a surrender, and to grant a new lease, so as to preserve the property in the same state of improvement at which it was at the time the new lease may be granted. If it could be sustained, that when a lease of this description has been once granted, there can be no surrender of that lease, and no new lease granted with a view to the effect which the remaining term in the old lease ought to have on the new lease, it would be extremely detrimental to all property of this description, and might be productive of great public as well as private injury.

"I, therefore, perfectly concur with the noble and learned Lord, that this case has not been so far considered as it ought to be considered in all its parts. I think the Court was perfectly right in holding that with respect to those leases granted upon the renunciation of leases which had not expired, the Marquis was not entitled to recover damage; he might have died before he could have suffered any damage. With respect to the other leases, although the case is not so made out that the Court could properly pronounce that there was ground for damages, I think the case was not so clear that the Court could pronounce there was no ground for damages, and that it ought to undergo a further revision and consideration in the Court below. The appellant ought to be at liberty to give in an additional condescendence, in

which facts and circumstances might be stated according to the view which the noble Lord and myself have conceived of this subject, to bring fairly in issue, and to the view of the Court, the facts of the case, so that the Court may ultimately come to such a determination as may be a guide to future decisions."

LORD CHANCELLOR,

"There is one circumstance I omitted. I stated that in my view of the case, the Duke was at liberty to take a renunciation of a subsisting lease, and to grant a new lease at a like rent, to himself and those to take after him. I had not forgot that it was stated by great professional learning at the bar, that a lease might have been granted by the Duke in the exercise of this power, reserving to himself the same rent as had before been paid, but reserving to those to take after him an increased rent; and I do not presume to form any judgment of the law of Scotland in that case, but I think no man in England would do any such thing as that; but I put it upon this ground,—if a lease is granted at a reasonable rent, it appears to me to be no objection to that lease, that the old lease has a time yet to run. Whether it is taken as the best rent that could be obtained, is a question which must be considered with reference to the circumstance. It occurs to me also to observe a looseness in the summons, namely, that the power is to let at the *best rent*, whereas, in the deed of entail, it is to let at a *reasonable rent*. My notion is, that that rent which is a reasonable rent, ought to be considered the best rent in many respects; with respect to the summons, in another part, they say it was let at inadequate rents. They cannot, I think, be considered reasonable rents, though reasonable rents, they may not be the very best rents."

Adjourned to Wednesday next.

25th May 1820.

"LORD CHANCELLOR,

"My Lords,

"In the case of the Marquis of Queensberry *v.* Montgomery, the proposition I have to make to your Lordships is, to affirm the interlocutor complained of, as far as it respects leases granted by William, Duke of Queensberry, on the renunciation of former leases, which, if not surrendered, would have been subsisting leases at the time the summons issued; and with respect to the rest of the leases to which the interlocutor relates, remit the cause back to the Court of Session in Scotland, to review the said interlocutors, with liberty to the appellant to give in an additional condescendence, in pursuance of the interlocutor of the Lord Ordinary; and to state in such condescendence, such further facts and circumstances as he may be advised to state with respect to

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each of such last-mentioned leases respectively, provided such further facts and circumstances be consistent with the terms of the summons, and warranted thereby. My Lords, I do not intend formally to move this now, but merely to lay it on the table until to-morrow, with a view that if the parties on either side have anything to suggest upon it, they may have an opportunity of doing it."

26th May 1820.

Journals of the House of Lords.

After hearing counsel, as well on Friday the 5th, as Monday the 8th days of this instant May, upon the appeal of the most noble Charles, Marquis and Earl of Queensberry, complaining of part of an interlocutor of the Lord Ordinary in Scotland, of the 24th June (signed 25th June) 1812; and also of two interlocutors of the Lords of Session, of 21st of February (signed 23d February) 1815, and the 15th November 1815, and praying the same might be reversed, varied or altered, &c. It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutors complained of in the said appeal, so far as they respect leases granted by William, Duke of Queensberry, on the renunciation of former leases, which, if not surrendered, would have been subsisting leases at the time the summons issued, be, and the same are hereby affirmed, without prejudice to any action or actions to be hereafter brought on account of the said leases; and with respect to the rest of the leases to which the interlocutors relate, it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to review the said interlocutors, with liberty to the appellant to give in an additional condescendence, in terms of the Lord Ordinary's interlocutor, and in such additional condescendence to state such further facts and circumstances as he may be advised to state, with respect to each of such last-mentioned leases respectively, provided such further facts and circumstances be consistent with the terms of the summons, and warranted thereby.

For the Appellant, *John Clerk, John Hope.*

For the Respondents, *C. Warren, Alex. Irving, Jas. Moncreiff.*

[Fac. Coll., Vol. xvi., p. 572; *et* Buchanan's Cases, 121.]

Mrs ANNE MAJENDIE, formerly ROUTLEDGE, wife of the Right Rev. HENRY WILLIAM, LORD BISHOP of BANGOR, and her said Husband for his interest, . . } *Appellants;*

THOMAS CARRUTHERS, Esq., describing himself of Dormont, and his Guardians, *Respondents.*

Et e Contra.

House of Lords, 6th July 1820.

ENTAIL—PRESCRIPTION—POST-NUPTIAL CONTRACT—JUS CREDITI—DISCHARGE OF RIGHTS.—By a post-nuptial contract, lands subject to the limitations of an entail made in 1708, were settled on the heirs male of the marriage, whom failing, on the heirs female of the marriage. The only issue of this marriage was a daughter; and on her marriage, her father entered into a transaction by which he paid her a sum in consideration of her discharging her rights of succession under this contract, which she did accordingly. The father then executed a new settlement of the estate. The daughter died in 1768, leaving a son. Her father died in 1773. The son brought an action of reduction (which, after his death, was carried on by the appellant, his sister), to set aside the above discharge, and all subsequent deeds. Held (1), That she was the heir female within the meaning of the post-nuptial contract 1735. (2), That the entail 1708 had fallen under the positive and negative prescription. (3), That the daughter had power to contract with the father and discharge her right under that contract.

By marriage contract and tailzie, entered into and made by John Carruthers, with consent of his father, on the one part, and Mary Bell, and her father, on the other part, he, John Carruthers, the father, with reservation of his own liferent, disponed to his son, "and the *heirs male of his then* "*marriage;* whom failing, to the heirs male of his body of "any other marriage; whom failing, to the heirs female of "the marriage without division; whom failing, to the heirs "female of his body of any other marriage without division; "whom all failing, to the heirs female of the said John Car-"ruthers, elder, his own body, without division, all and "whole the five merk land of Dormont," &c., and on the other hand, William Bell disponed to the said John Car- 1708.

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ruthers, younger, in liferent, and to the heirs male lawfully procreate betwixt him and the said Mary Bell, in fee, whom failing, to Mary Bell, her heirs or assignees whatsoever, all and whole the six merk land of Winterhopehead.

The tailzie contained the usual prohibitory irritant and resolutive clauses against alienating or contracting debt, and against altering the order of succession, and these were made to apply to Dormont estate as well as to Winterhopehead.

John Carruthers, the father, died sometime after the year 1720. John Carruthers, his son, died in 1722, and was succeeded by his eldest son, Francis Carruthers, who was heir of tailzie and provision under the contract of marriage and tailzie 1708, to all the lands therein contained.

In 1731, Francis Carruthers married Margaret Maxwell, daughter of Sir Alexander Maxwell of Monreith.

Four years thereafter, by a post nuptial contract of marriage, which, at that time, was not held in law to be an onerous deed, he resigned the lands of Dormont and others,

Dated Nov. 27, 1735.

for new infeftment to "himself and the heirs male lawfully "to be procreated betwixt him and the said Mrs Margaret "Maxwell, his spouse; which failing, the heirs male of the "said Francis Carruthers, his body, in any subsequent mar-"riage; which failing, the heirs female to be procreated of "the said spouses, and the heirs male to be procreated of "their bodies, the eldest daughter or heir female, and the "heirs male descending of her always excluding the rest, "and succeeding without division; which all failing, the said "Francis Carruthers, his heirs and assignees whatsoever."

Francis Carruthers was thereafter served "nearest and law-"ful heir male of provision of the foresaid marriage betwixt "John Carruthers and Mary Bell, his (grand?) father and "(grand?) mother, in terms of the contract of marriage entered "into between them."

He was also served heir in general to John Carruthers of Dormont, his great grandfather, and nearest and lawful heir in special to Francis Carruthers of Dormont, his great-great grandfather, and was infeft in the estate of Dormont.

Feb. 12, 1736.

He further obtained a charter of resignation from the Crown of the other lands of Knox and Twathels, &c., and likewise of the lands of Winterhopehead, in favour of himself and his heirs and assignees whatsoever; which charter bears that the lands of Winterhopehead, were resigned in virtue of the procuratory in the contract of marriage between John Carruthers and Mary Bell, to which the said Francis had

acquired right as heir of provision under that marriage contract; and on this charter he was infeft of this date.

John Carruthers, the second, father to John Carruthers, the third (who was married to Mary Bell), continued to possess the estate of Dormont during his life, on apparency as heir of the former investitures, but being bound by the contract of marriage and tailzie 1708, he could do nothing to infringe the rights so constituted. The same observation applies to his son, John, the third, who died about two years after his father.

July 1, 1739. Recorded 15th.

It was stated that the marriage of Francis Carruthers was not attended with the birth of issue for ten years after the marriage. At that time it was alleged she became pregnant, and gave birth to a female child in May 1741. It was also stated, that the father disowned this child as not being his; and that a few hours before the birth of the child, he had raised an action of divorce, and on the 9th of January 1742 (seven months after the birth), he had obtained a decree of divorce against her. The appellant stated, on the other hand, that the legitimacy of the child was unquestionable, and that afterwards, and from her earliest infancy, she was recognised and regarded as the lawful daughter of Francis Carruthers. She was married in 1758 to Henry Routledge.

By the marriage contract of her mother and father in 1735, it was provided, in the event of the heirs female being excluded from the succession to the real estates, that the daughter, if there should be but one, was to have the sum of 18,000 merks, or £1000 sterling, payable at her majority or marriage, which ever events should first happen. This last event having first happened, she and her husband raised an action for her provision, as stipulated in the marriage contract between Francis Carruthers, her father, and Margaret Maxwell, her mother. This action was brought against her father, and the latter having been specially called on by the Lord Ordinary "to confess or deny in explicit terms if, "or not, he acknowledged the pursuer to be the daughter of "Margaret Maxwell, born during the standing of the mar-"riage betwixt him and the said Margaret," he repeatedly declined to do so; and was finally held as confessed, and decree pronounced against him, of this date. Afterwards this was opened up, and a proof allowed and taken.

July 10, 1759.

At this stage, an extra-judicial arrangement was proposed by Mr Carruthers; and from the embarrassed circumstances

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of the pursuer then, was accepted of by her and her husband, namely, of £650, in full of all she and her husband could claim in full of her provision, under the marriage contract above alluded to. This agreement was made to form, by separate deeds, 1st, A submission to Mr Ferguson of Pitfour, advocate, and Alexander Lockhart of Covington, advocate, of "all questions, clags, claims, controversies, or demands of "whatever nature, that either party has or can have against "the other, and particularly all right or claim of succession, "or other right or claim of whatever kind, which the said "Elizabeth Carruthers and her husband have, or can pre-"tend to, either now or at any time, or in any event that "may hereafter happen, in virtue of the provisions mentioned "in the said contract of marriage, in favour of the children "thereof, either with regard to the succession of the estate "of Dormont and others, provided by the said contract." &c.

Dec. 7, 1759. The decree arbitral accordingly found due to the said Elizabeth, the said sum of £650, in full of her claims of provision under the said contract, and by a separate deed she was made to discharge these as the "only child procreate of "the marriage betwixt Francis Carruthers and Margaret "Maxwell;" and it set forth, "We decern and ordain the "said Francis to make payment of the said sum in full "satisfaction to the said Elizabeth Carruthers and her hus-"band, of all right and succession or other right, which "they or any of them have, or can or may have, at any "time, or in any event that may happen to the said estate "of Dormont."

When these deeds were executed, Mrs Routledge was a minor.

The day after this deed was executed, so anxious was Mr Carruthers to disinherit his daughter, that on 8th December 1759, he executed a disposition of his estate in favour of himself and the heirs male of his body; whom failing, to William Carruthers, his brother, and the heirs male of his body; whom failing, to his own nearest *heirs male* whatsoever. On the procuratory of resignation contained in this

Feb. 23, 1760. disposition, Francis Carruthers obtained a charter from the Crown, on which he was duly infeft.

Mrs Routledge died about the year 1768, and sometime afterwards her husband, leaving one son, John, the raiser of this action, and two daughters.

Francis Carruthers only died in the year 1773 or 1774, and was succeeded by his only brother, William Carruthers.

who served himself heir male of provision to Francis, of this date. Feb. 3, 1774.

It was stated, that William was not lucrutus by this succession, as it was burdened with debts equal to the value of the estate, but, having paid off these debts with his own funds he made, of this date, an entail of the estate of Dormont to himself; whom failing, to William Aikman Carruthers, his eldest son, and the heirs male of his body; whom failing, to the late Major-General Francis Carruthers, his second son; and failing him, to the other heirs therein mentioned; which was recorded in the register of tailzies, of this date. Jan. 1, 1781. Jan. 10, 1781.

William Carruthers died in 1787, and was succeeded by William, his eldest son, who was fifteen years in possession of the Dormont estate, but never made up titles. He died in 1802, and was succeeded by the respondent, his only son, then an infant, and who has not made up any titles to the estate of Dormont.

After the long period of possession had, and forty-six years after the discharge, the present action was brought by Mrs Routledge's son, John Routledge, and is now, after his death, continued by his sister, the appellant.

This action purported to be an action of reduction improbation, to set aside the disposition of the 8th December 1759, and whole subsequent conveyances of the estate on the following grounds, 1st, That they were in the face of, and in direct contradiction to the destination and obligations in the marriage contract in favour of the heirs of the marriage; 2dly, That they were likewise executed in the face of letters of inhibition raised by Sir William Maxwell and Lord Garlies, at whose instance execution was directed to pass on the contract, and so were reducible *ex capite inhibitionis;* and lastly, that his mother and grandmother, having both predeceased his grandfather, who died without entering into a second marriage, the writs called for had been executed in defraud, hurt, and prejudice of his just rights, as the heir served and retoured under his grandfather's contract of marriage.

Mr Carruthers also brought a reduction to set aside Mr Routledge's general service.

The defences by the respondent to the reduction, improbation, brought by the appellant's brother, contained a statement of the circumstances of Elizabeth Carruther's birth, and also set forth the divorce for adultery obtained against her mother,

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and alleged, from these, that there was good reason to believe that she was not, in point of fact, the daughter of Francis Carruthers. But the defences further stated, "that even "supposing, that at this distance of time the illegitmacy of "Mrs Routledge could not be legally established, every claim "which she and her husband, or the pursuer in their right "could make under the contract of marriage, founded on in "the summons, was finally settled and discharged by decree-"arbitral, and by deed of renunciation and discharge, in "consideration of full value received upwards of forty-six "years ago." And that this discharge and renunciation of all their claims under the contract of marriage, in the estate of Dormont, left in the person of Francis Carruthers a fee simple estate, which he could dispose of at his pleasure, and which, accordingly, he did effectually dispose of by the destination in the deed he subsequently executed.

The appellants' answer was, 1st, To the first defence, they maintained two propositions, *First*, they said, that according to the plain import of the award and discharge which followed upon it, Mrs Routledge gave up nothing but her own individual chance of succession under the contract, without affecting that of her children, or any other person who might be heir of the marriage at the death of Francis Carruthers; and *Secondly*, granting the intention of parties to be the reverse, and that the discharge was meant to operate against all the heirs of the marriage, it could not have that effect, because Mrs Routledge predeceasing her father, had no right to the estate of Dormont vested in her under the contract, which could be the subject of renunciation; in other words, the *jus crediti* was not in her, so as to entitle her to discharge that right, and consequently the heir of the marriage at the death of Francis Carruthers, who did not represent her, and was not bound by her deeds, became entitled, in virtue of her contract, to that estate.

After the conjoining the actions and certain procedure before the Lord Ordinary (Balmuto), who repelled the objections stated to the pursuer's title to insist, "but reserved to "the defender to establish what he alleges respecting the "illegitimacy and non-identity of the pursuer's mother." A proof was allowed; and the whole cause resolved itself into three questions: 1st, The legitimacy of Mrs Routledge. 2d, Whether the deed 1708 was prescribed, and its effect, with reference to the contract 1735. 3d, The effect of the compromise and discharge. The Court at first pronounced this inter-

"locutor: The Lords in the process of reduction improbation, "at the instance of John Routledge against William Thomas "Carruthers, do sustain the reasons of reduction of the dis- "position, and other deeds quarrelled, and reduce, decern, "and declare, in terms of the conclusions of reduction of "the libel; and in the counter process of reduction at the "instance of the said William Thomas Carruthers against "John Routledge, they repel the reasons of reduction, sus- "tain the defences, assoilzie and decern; but supersede ex- "tract until the first box-day; they allow the said John "Routledge to see and answer the same; the answers to be "printed and boxed on or before the first sederunt day in "May next, under an award of 40s. sterling." Feb. 21, 1811.

There was another action brought at the instance of the respondent, for reduction of the contract of marriage entered into by Francis Carruthers, in 1736, as in contravention of the marriage contract and tailzie 1708, which was also conjoined.

But at advising another reclaiming petition against this interlocutor, the Court pronounced finally this interlocutor: "The Lords alter their interlocutor reclaimed against, and in "the action of reduction raised at the instance of the late "John Routledge, Esq., and insisted in by the respondents, "his representatives, they repel the reasons of reduction, sus- "tain the defences, assoilzie and decern; and in the counter "action of reduction, at the petitioner's instance, sustain the "reasons of reduction, repel the defences, and reduce, decern, "and declare, in terms of the libel." * May 19, 1812.

An appeal having been brought to the House of Lords, the whole question was there debated, whereupon their Lordships ordered and adjudged, "that the cause be remitted "back to the Court of Session in Scotland, to review the "several interlocutors complained of in the said appeal, and "thereafter to do as shall appear to be just; and the Lords "think fit, in this cause, to require that the Judges of the "Division to which this case is remitted do require the "opinion of the Judges of the other Division, in the matters "or questions of law in this cause."

In making this remit the Lord Chancellor spoke, *vide* speech, Dow, vol. iv., p. 400.

By petition, the appellants applied to the First Division

* For Judges' opinions *vide* Fac. Coll., vol. xiv., p. 572; et Buchanan's Reports, p. 114.

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of the Court of Session, to apply this judgment, who ordered the cause to be stated in mutual memorials.

A preliminary point, as to Mrs Routledge's service and title under that service, having been disposed of, the First Division ordered the memorials to be boxed and transmitted to the Judges of the Second Division, and permanent Lords Ordinary, with a request that they should give their opinions in writing, either collectively or individually, on the following questions of law, arising therefrom.

Question 1. Was the pursuer's mother, Mrs Routledge, vested in the *jus crediti* under the marriage contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she settled, or as arbiters might decern?

2. Whether the decree arbitral was meant to regulate the succession of the estate, or was confined to the money provision?

3. Did Mrs Routledge, by her discharge and renunciation in 1759 following, on the relative agreement, submission, and decree arbitral, effectually discharge her *jus crediti* under the marriage contract 1735, so as to bar the claim of her son, John, who, by her pre-deceasing her father, became the heir of the marriage contract at his death; and but for that discharge and renunciation by his mother, would have taken the estate under the marriage contract?

4. Was the entail, in the former marriage contract in 1708, effectual to secure the estate to the heirs male of that marriage; and was it a valid and subsisting entail, binding on Francis Carruthers in 1735?

5. Supposing it to have been binding, is it cut off by prescription?

The following opinions were returned by the Lord Justice-Clerk, and those other Judges undernamed.

Answer to Question 1. We are of opinion that, in consequence of previous decisions, the pursuer's mother, Mrs Routledge, must be held as vested in the *jus crediti* under the marriage contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she might settle, or as arbiters might decern.

Answer to Question 2. We are of opinion that the decree arbitral was meant to regulate, and that its terms must be

held to apply to the succession to the landed estate of Dormont, as well as the pecuniary provision to which Mrs Routledge might eventually have been entitled.

Answer to Query 3. We think that Mrs Routledge, by her discharge and renunciation in 1759, did effectually discharge her *jus crediti* under the marriage contract in 1735, so as to bar the claim of her son.

Answer to Query 4. We are of opinion that the entail in the marriage contract of 1708 was, from the beginning, ineffectual, in so far as it relates to the lands of Winterhopehead; but that as to the lands of Dormont, and others, proceeding from the husband, it was in 1735, and in consequence of the titles afterwards completed by Francis Carruthers, effectual in terms of the Act 1695, c. 24.

Answer to Question 5. But it appears to us, that all obligations under the marriage contract 1708, is now cut off by prescription.

(Signed) D. BOYLE.
WM. ROBERTSON.
DAVID DOUGLAS.
AD. GILLIES.
D. MONYPENNY.

The following answers were returned by Lords Glenlee, Bannatyne, Craigie, Alloway, and Cringletie:—

To Query 1. Whatever might have been the effect of a conveyance by the pursuer's grandfather, of the whole estate settled by the contract of marriage entered into by him in 1735, in favour of the pursuer's mother, Mrs Routledge, and especially if she had survived her father; we are of opinion, that, as no conveyance was granted to her, and as she did not survive her father, she had no power to discharge the obligation in the said contract, any further than concerned herself, and the heirs who represented her.

Answer to Query 2. We think that the decreet arbitral was meant to apply to the estate, as well as to the sum of £1000 stipulated in the marriage contract, so far as regarded the interest of those who were parties to the submission. But that it cannot, in just or sound construction, be held to extend to heirs of the marriage who were not themselves, and do not represent those who were, parties to the submission.

Query 3. We are of opinion, that, Mrs Routledge, by the discharge alluded to in this query, did not effectually dis-

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charge the *jus crediti* under the marriage contract 1735, so as to bar the claim of her son John.

Queries 4 and 5. We agree with our brethren, that the destination of succession in the marriage contract 1735, was not rendered ineffectual by the entail in the contract of marriage 1708; and further, that this latter is now cut off, both by the negative and positive prescriptions.

The First Division of the Court, thereafter pronounced this interlocutor: "The Lords having advised the memorials,

May 26, 1819. "and additional memorials, and having also advised with the "Lords of the Second Division of the Court, and with the "permanent Lords Ordinary of both Divisions of the Court, "and having re-considered the whole cause, in terms of the "remit from the House of Lords, they adhere to their former "interlocutor, of date 12th May 1812, and decern in terms "of the said interlocutor, in the two several processes therein "mentioned. And further, in the process of declarator, of "irritancy and reduction brought at the instance of William "Thomas Carruthers, and founded on the contract of mar-"riage and settlement of tailzie of 10th August 1708, the "Lords find, that all claim at the instance of the pursuer of "the said process, upon the said contract of marriage and "settlement of tailzie, is cut off by prescription, both positive "and negative; and therefore sustain the defences in the "said process, assoilzie from the conclusions of the same, and "decern."

Dec 16, 1819. On reclaiming petition, the Court adhered.

Against the interlocutors pronounced and complained of in the former appeal, and the interlocutor of 25th May 1819, sustaining the defences for the respondent, the appellants, Mrs Majendie or Routledge, and husband, have brought their appeal to the House of Lords.

And the respondent has entered a cross appeal against the interlocutors of the 3d February 1818, from part of the interlocutor 25th May 1819, and from that of 16th December 1819, in which the objection to the title, and the point of prescription, are decided unfavourably to the respondent.

Pleaded for the Appellants.—1st, The destination in the marriage contract 1735, now to be considered, is to the heirs female of Francis Carruthers and Margaret Maxwell, failing heirs male of that marriage. Who were those heirs female? Mr Carruthers asserted that this was a very special destination, though in what its peculiarity consisted, he did not even attempt to point out, and could not have done so if he had

attempted it. It is just a destination to the heirs female of a marriage—a phrase, as may be supposed, of frequent occurrence, and of no sort of ambiguity. It does not call to the succession, though this is the necessary import of the argument maintained on the other side, the first heir female (for example, Elizabeth Carruthers, the daughter of the spouses), and her alone. It comprehends every heir of the same description, every heir female descending of the marriage, however near or distant his or her degree of descent. It not only denotes successive generations, but gives a preference to more distant generations over those who are prior in descent. "Words," says Mr Erskine, "which have a fixed legal meaning ought, when made use of in settlements or securities, to be understood in that meaning. Thus, when lands are provided in a marriage contract to the heir male, and in default of him, to the heirs female to be procreated of the marriage,—the appellation of *heirs female*, which is a known legal term, denoting the heirs at law after the failure of the lineal male issue, must be so understood as to prefer the daughter of a son of the marriage to the eldest immediate daughter, because the eldest immediate daughter is not in such a case the heir-at-law." And this doctrine was not contested by Mr Carruthers. "On general principles," he observed (and the case must be governed by *general principles*, unless they are shown to be inapplicable to it), "it is perfectly true that where an estate is destined generally to the heir female of a marriage, this is sufficient to carry it to a grandson by a daughter, and then to a grand-daughter, both being in their order the heir female."

Ersk. B. iii., tit. 8, § 48.

If, therefore, the provision here had been "to the heirs female to be procreated betwixt the said spouses, the eldest daughter or heir female, always excluding the rest, and succeeding without division," no doubt or question could have been raised. John Routledge, as the eldest heir female (for such he was though of the male sex), would have first taken the estate. On his failure, it would have descended to his sister, and with her and her issue it would have remained till the family was extinct. The descendants of her younger sister, did any such exist, were the next in order; and no claim by the heirs general or the assignees of the granter could have been successful, unless all these individuals and their descendants were extinct.

The soundness of this view, and the extravagance of the opposite doctrine with unjust consequences to which it unavoid-

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ably leads, were illustrated by a variety of cases which it is unnecessary here to repeat. Mrs Majendie shall only add, that the whole doctrine in the cross appeal upon this point, proceeds on a view clearly erroneous. He assumes, 1st, That the succession in favour of heirs female was limited to the daughter, if there was but one, and to the eldest, if there were two or more of Mr and Mrs Carruthers, in the face of an express destination, unambiguous in its nature, in favour of heirs female to be procreated of the bodies of Mr and Mrs Carruthers. He assumes, 2dly, That the destination was to the daughter of Mr and Mrs Carruthers, and the heir male of her body. Now, John Routledge, he goes on to maintain, was the heir male of Elizabeth Carruthers' body, and was served in that character, and Mrs Majendie who was an heir female of her mother's body, must be excluded by the assignees, the heirs female of the first heir female not being called.

Enough has been said as to the first of these positions, namely, that the destination now adverted to, is only in favour of the daughter of the spouses. The second position, that failing the first heir female, the *jus crediti* is limited to the heir male of her body, and that John Routledge was accordingly served heir male of his mother's body, shall now be considered. Now, this is equally at variance both with the law and the fact. It is not true in point of law, that the destination was limited to the first heir female, and the heirs male of her body; and it is not true in point of fact, that John Routledge was served heir to his mother, either as the heir male of her body, or in any other character. If he had, the present discussion would very speedily have terminated. He claimed and was served, as is proved by the terms of his retour, as heir *female* of provision in general to his grandfather under the marriage contract.

2d, The second point regarding the effect of the deeds obtained from Mrs Routledge by her father in 1759, is of chief importance in the present cause. The respondent maintains, that by a decree-arbitral in 1759, proceeding on a submission to which Elizabeth Carruthers was a party, and by a discharge of the same date with that decree, the obligation undertaken by Francis Carruthers was extinguished, and the right of the heir of the marriage for ever foreclosed.

The terms of the destination have been already adverted to. According to the conception of it, daughter or daughters might be excluded from the land estate, in case of an heir

male of the marriage succeeding; and, in that event, it was provided that one daughter (if there should be but one), should be entitled to 18,000 merks Scots (£1000 sterling), and two or more should have 20,000 merks, to be divided as their father should think fit, payment being (according to the contract), to be made at the first "term of Whitsunday or Martinmas, "after their respective majorities or marriages, which shall "first happen, with 10 per cent. of liquidate expenses in "case of failzie, and annual rent of the said respective por-"tions, so long as the same shall remain unpaid after the "foresaid terms of payment; and the said Francis Carruthers "binds and obliges him and his foresaids, to furnish the said "daughters with aliment, clothing, and education, according "to their degree, until the foresaid portions become payable."

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The marriage was dissolved without issue male; and, in 1759, Mrs Routledge, under the description of the only child of Francis Carruthers, procreate of that marriage, brought her action, in the circumstances and manner already alluded to. Now, as to the deeds which followed, namely, the submission, decree-arbitral, and discharge, the appellant contends they were carefully limited to *her own eventual* right of succession, and that they cannot, in sound construction, be extended beyond that individual and eventual right. *Her* competency to execute any discharge or renunciation of a more extensive description, is a separate question, and will be considered separately. 1st, The first of these propositions was attempted to be obviated or excluded upon the score of irrelevancy. It was said that if the sole *jus crediti* of the contract was vested in Mrs Routledge, she has discharged that full right, and that any further discharge or mention of the right of her children, or of those who came to be vested with the characters of heirs of the marriage, would have been altogether superfluous; and it was likewise urged that an investigation into the circumstances of the case, or the situation of the parties, cannot possibly lead to any satisfactory result, inasmuch as these circumstances cannot be perfectly known at this distance of time, and because the respondents' action does not and cannot rest upon any averment of fraud in the conduct of the parties, or of enormous lesion in the transactions concluded betwixt them. The discharge was not meant to extend beyond Mrs Routledge's individual hope of succession, so as to affect others called to succeed by the marriage contract after her, and this is made plain from the documents themselves. But, supposing a contrary view

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to be entertained, this would necessitate a situation which, in law, has never been recognised. It would support the idea that the mother had a right and power to discharge the rights of her children, or those substituted or called after her. What right had she to discharge? Nothing, assuredly, but her own eventual right, which, eventually, may be said to have never emerged, because of her predeceasing her father. Besides, the destination was to the heir of the marriage, that is, to that person who, at the death of the father, shall be the legal heir, and take up the succession as such; and that was John Routledge. But, besides a right or *jus crediti* to the estate, there is a *jus crediti* in the right to succeed to it in the event of the succession opening to the individual who is presumptive heir of the marriage for the time. This right becomes, of course, unavailable to any presumptive heir who shall predecease his father, during his father's lifetime, and the actual and effectual right vests only in the person who actually is heir at the father's death. But the respondent says, that the heir presumptive has a *jus crediti* which he may effectually discharge. The answer is obvious; he has certainly a *jus crediti*, and may discharge it; but it is only a conditional and eventual right, not properly as a creditor for the estate, but as a creditor in the right of succeeding as heir to the estate, free from any gratuitous deed of the father to the prejudice of that right of succession. He has a *jus crediti* to a right of succeeding as heir at his father's death, provided, of course, that he survives his father; and this eventual right of becoming heir, upon survivance, he may discharge, but no more. It was precisely this kind of right or *jus crediti* that Mrs Routledge had in her, and that she had discharged; but having predeceased her father, the event never arrived, and another heir, whose right she could not discharge, then emerged.

3d, On the cross appeal. In regard to the contract of marriage, 1708, the respondent maintained that by that deed, the whole lands were put under the fetters of a strict entail, and, therefore, the marriage contract, 1735, was executed *in fraudem* of that contract and deed of tailzie; but the answer to this proposition is at once obvious, that now all claim upon that contract and tailzie has been cut down, both by the negative and positive prescription—a plea which the Court below had no hesitation in unanimously sustaining.

Pleaded for the Respondent.—1st, As to the validity of the decree-arbitral and discharge, it is necessary, in judging of

these points, to look at the nature of the appellant's action. The appellant does not represent, nor is served heir to her mother. She is not entitled to reduce, and has not attempted to reduce the submission, decree-arbitral, and discharge on the head of fraud, circumvention, facility, concussion, oppression, or the like. The appellant has no right to bring such action. The action which the appellant has raised, is insisted on in her own right alone, not founded on any right that was in the person of her mother. The sole ground of this action is a denial that her mother had any right in her to discharge so as to prejudice the right of the appellant.

2d, When a man binds himself, in his contract of marriage, to settle his lands upon himself and the heirs of the marriage, it is in the power of the eldest son, or heir of that marriage, effectually to discharge the father's obligation, so as to enable him to alter the order of succession, or otherwise dispose of the estate, without being liable to any claim under the contract. But while the respondent maintains that the heir of the marriage has a power to *discharge* the contract, and that the father may, in consequence of such discharge, freely settle the estate as he pleases, he does not maintain that the *heir* has a power to *convey* the right under it to a third party during the father's lifetime. The appellant has uniformly endeavoured to confound these two propositions, although the difference between them in law, is as clearly marked as any distinction in the law of Scotland. But then, it has been denied by the appellant, that the heir of the marriage can, without specific implement, effectually discharge the contract, so as to disappoint the other heirs of the marriage, in the event of *his predeceasing the father*. The appellant has always assumed that this plea is made out, by merely asserting, without any authority whatever, that in such cases, during the life of the father, the heir of the marriage has no right in him to *discharge, because* he has no power in him during the lifetime of the father, to make an effectual conveyance of the right under the contract to a third party.

There is in this mode of reasoning, a plain evasion of the true question. The respondent maintains that the heir of the marriage has in him, during the father's life, all the right that is necessary to enable him to *discharge* the contract in favour of the father himself; but that, on the other hand, he has no right which he can transfer to a third party.

3d, The appellant has endeavoured to create doubt as to the *import* and *meaning* of the decree-arbitral and discharge. But,

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in truth, this point is involved in the question of *power*. And if it shall be satisfactorily shown, that Mrs Routledge had in her the only *jus crediti* of the contract, and full power to discharge every right under it, no doubt can be entertained that the *decree-arbitral* and discharge were granted, and are effectual deeds for that purpose. The argument of the appellant on this point is, that there was no intention to discharge anything more than the *spes successionis*, as it is termed, of Mrs Routledge individually, because she had no power to discharge *more*, and was not supposed by the learned arbiters, to have power to discharge more. This involves necessarily an inquiry as to what is understood by the law of Scotland upon this question of power. That the terms of the deeds themselves are amply sufficient to discharge the whole obligations of the marriage contract, is a proposition no lawyer can dispute. The question, therefore, is, Could Mrs Routledge discharge the obligations of the contract? If the whole *jus crediti* was in Mrs Routledge exclusively, —if she could take implement during the lifetime of her father, or discharge, on what terms she pleased, the obligations of the contract,—and, if having the sole *jus crediti* under the contract vested in her, her discharge was sufficient to extinguish the obligations of that contract, it is plainly idle to allege that the discharge could have mentioned any right either actual or eventual, of her children; for, *ex hypothesi*, the whole right was in Mrs Routledge, and her discharge extinguished the obligation. Hence it would have been an absurdity and contradiction in terms, to make Mrs Routledge discharge for her children, whose claims were necessarily and for ever cut off by the discharge of her own right.

4th, As the law now stands, the heir of the marriage has not merely a *spes successionis*, like other heirs of provision, but a *jus crediti*. But no fact in the history of the law is more certain, than that, till the beginning of the seventeenth century, when a man became bound, by his contract of marriage, to settle the estate on the heirs of the marriage, the import of the obligation was no more than that a *simple destination* in their favour should be inserted in the investiture. It was held that the father had power to alter or revoke such destinations, so it was decided in the case of Aikmans, 20th December 1550. But this part of the law underwent a change, depriving the father of his power to alter the investiture, and giving to the heir of the marriage a *jus crediti*, defeasible, of course, by the father's onerous debts and deeds,

Balfour, p. 222.

and even subject to his right to alienate the entire subjects for onerous causes. The question, therefore, is, Can the heir of the marriage, as creditor under the contract, during his father's life, accept of implement of the contract in whole or in part. The respondent conceives that he may accept of implement, and discharge the obligations, and has full power so to do. There can be only one heir of provision having a *jus crediti* at one and the same time, and that this *jus crediti* is not descendible to any other, but is extinguished at his own death, if he dies before his father, or without making up titles as heir of provision.

The plain truth is, that the debtor and creditor together can discharge the whole obligation; because the *jus crediti* being wholly in the one, and the condition which qualifies it being under the power of the other, if the condition is, waved or discharged (which it is clear the father can do, if he can give implement at all), then the creditor can discharge the obligation. Thus the consent or will of the father as well as the act of the creditor, concur, in making the discharge good and effectual.

The other heirs male in the contract, were like the extraneous heirs in other contracts of marriage, heirs *in destinatione*, but they were not heirs *in obligatione*. Nothing is more common in contracts of marriage than to settle the estate upon a series of heirs to succeed, failing the children of the marriage; but it was never held that the father came under any obligation to those stranger heirs. None of these heirs could succeed on any other footing than as heirs in the destination, which the father could alter or not, at his pleasure. It never was supposed, therefore, that any extraneous heir, though called by the contract, had a *jus crediti* under it. On the other hand, when the heir of provision discharges the contract, nothing is thereby discharged but the father's obligation, as the destination still remains, and it is commonly inserted in the investitures. Attending to these things, it cannot be doubted that Mrs Routledge had power to discharge the contract; in which case, the whole obligation on the father was extinguished.

On the cross appeal, the appellant has no *title* to pursue the present action, because, by the marriage contract, 1735, she is not heir of provision under that deed. The destination was, to heirs male of his body, whom failing, "To heirs female to be procreate betwixt the said spouses, and the heirs male "to be procreated of their bodies." The appellant is not an

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heir male of the body of her mother; and therefore, has no title to sue.

Besides the deed of entail and contract of marriage, 1708, is an effectual and subsisting title, and that being a subsisting and effectual title, it affords a good defence to the action of the appellant on the marriage contract, 1735. The latter deed was granted in prejudice and in contravention of the rights of the heirs of entail, and contrary to the powers of Francis Carruthers, who executed that deed in 1735.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *R. Gifford, Mat. Ross, Wm. Erskine.*

For the Respondents, *John Clerk, James Moncreiff, John Hope.*

[Hunter's Landlord and Tenant, vol. ii., p. 476.]

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THE DUKE OF ROXBURGHE v. ROBERTON.

JAMES DUKE OF ROXBURGHE, . . *Appellant;*

JOHN ROBERTON, late Tenant of Newton, *Respondent.*

House of Lords, 17th July 1820.

LANDLORD AND TENANT—LEASE—STRAW OF THE WAY-GOING CROP.—Held under a clause in the lease, that the landlord was entitled to prevent the disposal of the straw or hay of the way-going crop, it being provided, that it should always be spent on the farm.

In a lease granted to the respondent of the farm of Newton, belonging to the appellant, there was the following clause: "at no time shall the said John Roberton, or his foresaids, "sell or give away any of the hay or straw of said farm, "which shall always be spent on the ground." The tenant at the expiry of his lease, gave notice, that he meant to sell the whole straw of that crop, unless the appellant would take the crop, both corn and straw, at a valuation, insisting that the above clause in his lease did not refer to the last year of the lease; whereupon the Duke brought a suspension and interdict (injunction). The Lord Ordinary held, that the above clause could "not be held as applicable to the "hay or straw of the out-going crop." And to this, the Court, on two several reclaiming petitions, adhered.

Dec. 28, 1815.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and declared, that the respondent, according to the true intent and construction of the tack, is not entitled to sell or give away any of the hay or straw upon the farm, at any time during the continuance of the tack, or upon the same, at the time of the expiry of the tack; and it is ordered, that, with this declaration, the cause be remitted back to the Court of Session to review the interlocutors complained of, and further to do in the cause as is just and consistent with this declaration. Journals of the House of Lords.

For the Appellant, *F. Jeffrey, J. H. Mackenzie.*

For the Respondent, *Chas. Wetherell, John A. Murray.*

RICHARD HOTCHKIS, W.S., and JAMES TYTLER, W.S., Trustees of the deceased Colonel William Dickson of Kilbucho, *Appellants;*

JOHN DICKSON, Esq., Advocate, of Kilbucho, ... *Respondent.*

House of Lords, 19th July 1820.

REDUCTION OF DEED—ERASURE.—Held, that a deed of entail had not been executed under the influence of fraud or compulsion, but voluntary on the part of the maker, and was, therefore, not reducible.

A reduction was brought by the appellants against the respondent, whereby they sought to set aside a certain deed of entail, which they alleged had been executed, not in terms of the entailer's intention, but through the fraud of the respondent, his brother, now possessing the estate, whereby their constituent's right in the said estate of Kilbucho had been limited to a liferent instead of giving him absolute powers over his own estate.

The Lord Ordinary pronounced this interlocutor "In re- Nov. 16, 1813.
"spect, 1st, That it does appear that the execution of the
"deed of entail 1809, was, under all circumstances, a

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"measure highly proper, prudent, and expedient on the part "of the pursuers' constituent; 2d, That it is admitted by "the pursuers, that he voluntarily executed the said entail, "and had power to do so; and that there does not appear, "from the terms of the deed itself, or any other collateral "circumstances, any foundation for the allegation that the "pursuers' constituent was improperly or fraudulently induced "to execute such deed, and that the present proceedings "seem to arise rather from a change of mind on the part of "the pursuers, than the discovery of any facts attending the "execution of the entail 1809. Therefore, refuses the desire "of the representation, and adheres to the interlocutor re-"claimed against."

June 2 and 28, 1814.

On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For the Appellants, *John Clerk, Geo. Cranstoun.*

For the Respondent, *Alex. Maconochie, Sir Saml. Romilly. John A. Murray.*

NOTE.—In the House of Lords, the appellants pleaded much on the deed being void as vitiated *in substantialibus.* It bore to have been executed on the 24th of April 1809; but the word *fourth* was clearly written on an erazure, and, therefore, they contended that this objection was fatal to the validity of the deed, but this was disregarded.

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GRAHAM v. KEBLE, &C.

THOMAS GRAHAM, Esq. of Kinross, . . *Appellant;*

PAGE KEBLE, Esq., a Lunatic; ROBERT SAUNDERS, Esq., his Committee, under the appointment of the Lord Chancellor of England, and ROBERT RATTRAY, his Mandatory, ... } *Respondents.*

House of Lords, 21st July 1820.

INTEREST—FOREIGN RATE—RES JUDICATA.—(1) Held, that in

making a claim against a solvent partner of a firm, who had at one time acted as agents in Calcutta for the party claiming, and had in that capacity uplifted Indian Bonds, he was entitled to charge 12 per cent., being the India rate of interest up to 13th November 1813, and to 5 per cent. thereafter. (2) That a former decree was not *res judicata* on the question.

This appeal arose out of a former appeal between the same parties, (*vide* Dow, vol. ii., p. 17) in which the interlocutors of the Court below were affirmed.

The action had been brought for payment of a large sum of East India Bonds, deposited in the hands of the Company of Graham, Crommeline and Moubray, Agents in Calcutta, by Mr Keble on the eve of leaving India. The partnership had changed subsequent to this deposit, first, by the retirement of Mr Crommeline in 1787, after which Graham and Moubray continued the firm, with the possession of these funds, and, second, the retirement of the appellant, Graham, in 1791, after which event, the firm of Graham, Moubray, and Company failed, with the proceeds of these India Bonds in their hands.

The former action and appeal was, as to Graham's liability to make good the amount of this India Stock. The Court of Session and the House of Lords held him liable.

On the case coming back from the House of Lords, a state was given in which the foreign or Indian rate of interest was charged at 12 per cent., from the different periods at which the bonds had been uplifted by them, calculated down to 12th November 1813, the said sum, inclusive of interest charged at the said foreign rate, amounting to £19,413, 16s. 2d. The respondents, besides claiming this foreign rate of interest up to 12th November 1813, claimed interest on that sum, at the rate of 5 per cent., until paid, and, in support of this claim, it was concluded that the matter was *res judicata* by the former appeal.

The Lord Ordinary and the Court allowed the foreign or Indian rate of interest, up to that date and interest on the accumulated sum at 5 per cent. thereafter. June 28, 1814. Dec. 2, 1814. Dec. 22, 1814. Nov. 15, 1815. Feb. 13, 1816.

Against these interlocutors the present appeal was brought to the House of Lords. Mar. 8, 1816.

After hearing counsel,

It was ordered and declared, that the appellant is to be charged with interest at the rates following, viz., with Journals of the House of Lords.

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interest at the rate of 12 per cent. upon the balance of any account which shall appear to have been stated and signed, and which is mentioned in the summons in this action: such interest to be calculated from the date of the account so stated and signed, to the 10th of November 1813, and with interest of the several bonds in the proceedings mentioned, at the rate per cent. which they respectively bore until the times when they were respectively paid and discharged or indorsed away, and value was given for the same, and with interest at the rate of £12 per cent. from and after such times respectively to the said 10th November 1813, when the former appeal was dismissed in this House; but that the appellant is to have proper and just allowances and deductions made in respect of partial payments, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain, of the consolidated amount of the debt, which shall be constituted against him, up to the said 10th November 1813. And it is further declared, that the appellant is chargeable with interest at £5 per cent. upon such consolidated amount of debt, from the said 10th November 1813 until payment thereof, but with a due deduction of the property-tax upon the amount of the interest of such consolidated amount of of debt, so long, and at such rates as the same were chargeable upon the appellant's property in Great Britain; and it is ordered, that with these declarations the cause be remitted back to the Court of Session, to do therein as is just and consistent with these declarations.

For the Appellant, *James Wedderburn, Wm. Wingate.*

For the Respondents, *Sir Saml. Romilly, James Gordon.*

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CRAIGDALLIE, &c. v. AIKMAN, &c.

JAMES CRAIGDALLIE and Others, . . *Appellants;*

The Rev. J. AIKMAN and Others, . . *Respondents.*

House of Lords, 21st July 1820.

PROPERTY OF CHURCH—SECEDING BODY.—A difference of opinion having occurred in the Associate Synod of Burgher Seceders, in reference to the principles of their Church in regard to the power

of the civil magistrate, and the ordination of ministers, the majority proposed an alteration in the formula, which was alleged to be a departure from the original principles. In a question as to the property of the Church, Held that the pursuers (appellants) had failed to condescend on any acts done, or opinions professed by the Associate Synod, or the respondents, by which they could call on the Court to say that they had deviated from the original principles and standards, and therefore had no right to disturb the defenders (respondents) in possession of the church now in question. Affirmed.

In the former appeal in this case, the House of Lords made a special declaration, remitting back the cause to the Court of Session for re-consideration. *Vide* Dow's App. Cases, vol. i., p. 1.

The circumstances out of which the question of property arose, proceeded from a difference of opinion as to their principles, taking place amongst the body calling themselves the "Associate Burgher Seceders of Perth."

In 1731, when the Established Church was keenly engaged in discussions relative to the mode of appointing to vacant churches, the result of these contentions was, that a great many of the clergy, who refused to give up or conceal their opinions, were expelled from their livings by sentence of the General Assembly.

It was stated by the appellants, that the expelled pastors, with a great body of the people adhering to them, erected places of worship for themselves, and were denominated *Seceders*. This term, they added, was to be carefully distinguished from that of *Dissenters;* for they dissented from none of the religious doctrines of the Church of Scotland; on the contrary, they strictly adhered to the tenets as by law established and recognised, until a party to whom the respondents belong, did actually, though covertly, dissent. Considering themselves as true representatives of the Presbyterian Church, they were of course to be under the direction of certain judicatories, for discipline and order, and, accordingly, had their kirk-sessions, presbyteries, and synods, composed as in the Established Church, of clergymen and lay elders.

The Rev. Mr Jervie was the principal minister of this congregation at the time, and the Rev. Mr Aikman was his colleague.

Dissensions having, however, arisen as to the fundamental

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principles of the secession, the party with whom the appellants co-operated, contended that the standards of their Church were the Westminster Confession of Faith, the Larger and Shorter Catechisms, certain propositions respecting church government and the ordination of ministers, together with the National Covenant of Scotland, and the Solemn League and Covenant of the three nations. The respondents seemed to admit all this, with one exception; they ignored the power of the civil magistrate, and they therefore disavowed the doctrine in the Confession of Faith respecting the power of the civil magistrate, in regard to religion, and the doctrines and declaration in the National Covenant.

A majority of the money contributors, along with the principal minister of Perth, the Rev. Mr Jervie, with a part of his session and congregation, were of the former opinion, adhering to the original principles; the Rev. Mr Aikman, and others, were of the latter, and, adopting the new doctrines, adhered to the Synod.

The Synod ended their deliberations upon the subject by adopting the following Preamble to the Formula: "Whereas "some parts of the standard books of this Synod have been "interpreted as favouring compulsory measures in religion, "the Synod hereby declare, that they do not require an "approbation of any such principle, from any candidate for "license or ordination: And whereas a controversy has "arisen among us respecting the nature and kind of obliga- "tion of our solemn covenants on posterity, whether it be "entirely of the same kind upon us, as upon our ancestors "who swore them, the Synod hereby declare, that while "they hold the obligation of our covenants upon posterity, "they do not interfere with that controversy which hath "arisen respecting the nature and kind of it, and recommend "it to all the members to suppress that controversy, as tend- "ing to gender strife, rather than godly edifying."

Thereafter the Rev. Mr Jervie, with whom the appellants agreed, having taken no part in the proceedings before the Church Court, protested against the proceedings of the Synod, and the preamble adopted by a majority of that Synod; and until this preamble was removed, he declared his intention to decline the authority and jurisdiction of the Associated Burgher Synod, and of all presbyteries subordinate to it, at same time declaring his opinion that he had full authority, notwithstanding, to exercise the duties and func-

tions of the holy ministry, in the place where he had been in use to exercise it.

In consequence of this step, the Presbytery of Newburgh, within which the Perth congregation was held to be situated, declared him no longer a member of their body; they appointed another minister to preach at Perth on the following Sunday.

The appellants, who agreed with him, then brought their action to the Court of Session, for having it declared, that, "The Meeting House and pertinents are the property of the "pursuers, and those who should adhere to them, and their "heirs and successors, for themselves and the other members "of the society of Associate Burgher Seceders of Perth, ad-"hering to and professing the principles of the Original "Burgher Secession, and whose ancestors contributed to the "purchase of the ground, and to the erecting of the buildings "thereon."

A counter action of declarator was brought by the now respondents, to have it declared that the Rev. Mr Jervie, and others (appellants), had, by their disclaiming their connection with the Associate Presbytery and Synod, thereby lost all interest which they, or any of them, had in the said subjects, and, consequently, have now no longer right to interfere with the pursuer, his elders, deacons, and congregation, in the use and exercise of the said Meeting and Session House.

The respondents grounded their action on this, that the opinions held by the appellants were a total departure from the fundamental principles which separated them originally from the Establishment.

In these actions the appellants were made pursuers, and the respondents defenders.

The Court, after much discussion, pronounced the following interlocutor, which formed the first appeal to the House of Lords: "The Lords find that the property of the subjects "in question is held in trust, for a society of persons who "contributed their money, either by specific subscriptions, or "by contribution at the church-doors, for purchasing the "ground, and building, repairing, and upholding the house, "or houses, thereon, or of paying off the debt contracted for "these purposes, such persons always, by themselves, or "along with others joining with them, forming a congrega-"tion of Christians continuing in communion with, and sub-"ject to, the ecclesiastical discipline of a body of dissenting "Protestants, calling themselves the 'Associate Presbytery Feb. 21, 1804.

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" and Synod of Burgher Seceders,' and remit to the Lord " Ordinary to proceed accordingly." *

* Opinions of the Judges :—

LORD PRESIDENT (CAMPBELL) said,—

" There seems to be little doubt that the property in question belongs to, and is held in trust for, a larger description of people, than merely the persons who originally subscribed small sums for purchasing the ground, and raising the buildings upon it, as a great part of the expense was defrayed by after contributions. The establishment, in short, was made for a seceding congregation of a certain description, called the Associated Congregation of Burgher Seceders at Perth; and, of course, the members of that congregation, who either originally contributed, or afterwards acceded, became proprietors of the feudal subject, and they, or a majority of them, in case they differ in opinion, must regulate the management, and dispose of the property, when any dispute arises.

" As to the Associated Synod, the Court can take no notice of any such body of men, as a superior judicature, exercising the rights of control over the congregation, or having any thing to do with the enjoyment, or disposal, of their civil properties. The Court, upon one occasion, ordered the very name assumed by them to be expunged from the record; and, it is clear, from the terms of their own original establishment, that they pretended to nothing but a direction in spiritual matters. The words, " Key of government and discipline," &c., are merely figurative, and have no relation to temporal affairs. Their sentences of deposition of one minister, and appointment of another, cannot be regarded by this Court. Neither can we enter into the dispute and schism among them, about spiritual matters, or speculative doctrines of any kind.

" The sole question is, Who are the majority of this body of individuals, assuming the name of a congregation, and who are the trustees named by them, in whose favour those who are at present trustees were called upon to denude of the property, in order that it may be at the disposal of the persons having right in law to that property, and who may, of course, appoint any person they please to occupy the premises, and to perform worship in their own way, to the people of the congregation? This is a question of a very simple nature, and easily extricated; and it is upon this principle that all the former decisions have rested. Voluntary bodies have not the privileges of lawful incorporations.

" It was for sometime thought that seceding congregations, not being societies known in law, could not maintain action for the

On appeal to the House of Lords, the judgment pronounced was as follows:—"The Lords find, as matter of fact, suffi-

purpose of asserting their just rights. But this was altered in a case from Lanark, Morrison *v.* Struther, in 1757; Wilson *v.* Jobson, 13th December 1771; Allan *v.* M'Rae, 8th March 1793; Smith *v.* Kid, 26th May 1797, &c. But when parties come regularly before a Court, in order to have their differences on points of *civil* right determined, they must found their pleas on common established grounds of law, and the judge cannot listen to the religious doctrines, either of ecclesiastical discipline, or of moral, or political systems, adopted by voluntary associations of men, uniting together for any purpose whatever."

June 18, 1813. These cases do not appear to be reported.

LORD HERMAND.—"I cannot admit the title of the Associate Synod. It is a mere question of civil right, and the property belongs to the majority of contributors."

LORD CRAIG.—"I am of the same opinion. It is said that the trust was for an Associate congregation; and that it must depend on the principles of the Associate Synod, who are entitled to regulate the principles, and, consequently, the rights of the congregation? The congregation has put itself under the Synod, as to ecclesiastical matters alone. They may censure—they may depose, &c., *quoad* their own body; but it is incompetent for them to regulate the civil rights."

LORD MEADOWBANK.—"The New Light Men come nearest to the Church of Scotland. It rejects persecution, heresy, &c. The trustees hold the property for the congregation, or those of it adhering."

At another Advising.

LORD PRESIDENT (CAMPBELL) said,—"The change of opinion and principles is in the Presbytery and Synod, not in the congregation—or at least the majority of that congregation. The continuing together as a congregation, and still more, the subjecting themselves to the control, or inspection, of ecclesiastical superiors of any description, is all a voluntary business. They may dissolve themselves when they please. They may change their principles, and they may put themselves under other superiors. In all such circumstances, we can only count numbers, otherwise we at once convert them into a permanent establishment—a legal incorporation. In the case of Auchinclose, the Synod and the majority of the congregation were at one; and Auchinclose maintaining himself in possession by force. Why alter the terms of the original trust. The same body that exercises the right of patronage, exercises also the power of management and possession of its property."

Mar. 7, 1773; Lord Braxfield's decision unreported.

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"ciently established by proof, that the ground and buildings "in question were purchased and erected with intent that

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LORD WOODHOUSELEE.—"The trust was not executed for a few individuals, but for the congregation."

LORD JUSTICE CLERK (HOPE).—"I am of the same opinion. An individual may reserve the right of property, and the right of patronage, to himself when he erects a church. Such persons may also put the management and the right of patronage in another. This congregation did not mean to become independent. They meant to continue the same as before—Presbyterians. The essence of it is subordination. Even when Episcopacy was restored, the presbyterian form continued. If a minister is deposed by his own judicatures, we must give effect to it even *civilibus*. Complete toleration is not substantially different from the Establishment. I have no access to know who are the real Burgher Seceders, but the judicatories themselves. Craigdallie, and those who adhere with him, have seceded from the Burgher Secession: For what? Simply for adhering to their original principles. On the whole, I am for adhering."

LORD HERMAND.—"I am for the contrary. The respondents have committed a violation of the original compact. The society here was formed for exercising constitutional powers."

LORD MEADOWBANK.—"I am for adhering. The mortification was for a legal use. We cannot go into extreme cases. There must be somebody to describe, and ascertain what are the religious principles, or discipline, to be followed in the case of this endowment. The loyalty of these men is not to be doubted. Who can turn out Mr Aikman, who was regularly ordained and placed in this church? Must he be turned out because Craigdallie has changed his mind? I think that would be a hard case."

LORD CULLEN.—"The nature of the trust must be looked to. It was intended to be permanent—even a Professor of Divinity was to be appointed. We cannot invert the purposes of the trust. We cannot review the sentences of their Church Courts, except to be satisfied that they are agreeable to the rules laid down by themselves." (Here his Lordship referred to the opinion of English counsel, in the case of Kirkpatrick). "In cases of removal, &c., of dissenting ministers, the usual inquiry is, Which is right according to their established regulations and principles of the body?"

LORD CRAIG.—"I am for altering. The majority of the body are entitled to alter the original purpose or formula. The Synod having changed their principles, it is a little hard and intolerant to insist that their brethren should change also. Is it meant that if the *whole* congregation should be of one mind they must, never-

" the same should be used and enjoyed for the purposes of " religious worship, by a number of persons agreeing at the " time in their religious opinions and persuasions, and, there- " fore, intending to continue in communion with each other; " and that the society of such persons acceded to a body, termed " in the pleadings, 'the Associate Synod;' and find that it " does not expressly appear, as matter of fact, for what purposes " it was intended at the time such purchase and erections " were made, or at the time such accession took place, that " the ground and buildings should be used and enjoyed, in " case the whole body of persons using and enjoying the " same, should change their religious principles and per- " suasions, or if, in consequence of the adherence of some " other such persons to their original religious principles and " persuasions, and the non-adherence of others of them thereto, " such persons should cease to agree in their original religious " principles and persuasions, and should cease to continue " in communion with each other, and should cease, either as " the whole body, or as to any part of the members composing " the same, to adhere to the body termed in the pleadings, " 'the Associate Synod;' and it is, therefore, ordered and " adjudged that, with these findings, the cause be remitted " back to the Court of Session in Scotland, to review all the " interlocutors complained of in the said appeal; and upon " such review, to do therein what shall appear to them to be " meet and just."

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theless, forfeit their property? This would be an *imperium in imperio*."

LORD ARMADALE.—" We must give effect to the trust, and look to its original purpose, and give the property to the majority."

LORD BALMUTO.—" I am for altering."

LORD BANNATYNE.—" I am for adhering. Jervie has departed from his order."

LORD METHVEN.—" I think the majority is the rule."

LORD GLENLEE.—" I have great difficulty as to the adjection of anything which answers a condition. Yet, upon the whole, I think the majority of those having the *interest* must have the *power* of altering the purpose. Suppose they had inserted the proposed conditions, would they have been of this nature? Suppose an Act of Parliament were to pass about it, would not reasonable clauses have been put in?"

LORD DUNSINNAN.—" I am for altering."

LORD POLKEMMET.—" I am for adhering."—*President Campbell's Session Papers*, vol. CXVIII.

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In pronouncing this judgment, Lord Chancellor Eldon spoke as follows:—

"My Lords,*

"I will avail myself of the present opportunity to state to your Lordships what has occurred to me upon a case of very great importance, to which I have given all the attention it has been in my power to bestow, and which was not heard in presence of any of the noble Lords who have attended this House lately. It was a case in respect of the use and enjoyment of a meeting-house in Perth. There were two interlocutors pronounced in the Court of Session, under the circumstances which I shall have occasion to state to your Lordships. One, an interlocutor of the 16th November 1803, on the report of the Lord Ordinary, Lord Armadale, who, I ought to explain to your Lordships, afterwards changed the opinion he had formed when he first made the report, upon which the Court pronounced that interlocutor, when he came to give his opinion as a judge of the Court of Session, at pronouncing another interlocutor, on the 1st of February 1804. The Court affirmed the interlocutor of the 1st of February 1804, by another interlocutor of the 27th June 1805, and another of the 10th February 1806, against all of which the present appeal is brought; and the case has certainly very much distracted the judges of Scotland, because, in addition to the circumstances I have mentioned, that my Lord Armadale changed his opinion when he came to sit in full Court, I think I am justified by the papers before me in representing to your Lordships, that this case has been *now* decided by the narrowest possible majority, namely, by calling in the Lord President, on there being an equality of voices among the other fourteen judges; and I am sorry to observe to your Lordships, that unless I have mistaken the circumstances of this case, in respect of the effect of these circumstances, it would be quite impossible for your Lordships to decline remitting this again to the Court of Session, inasmuch as it seems to the individual who has the honour of addressing your Lordships, that it is perfectly impossible, whichever party is right in point of law, to apply, in fact, any of the interlocutors of the Courts.

"I will beg your Lordships' attention to the first interlocutors of the Court of Session, because the third and fourth are mere affirmances of the second. In the interlocutor of the 16th November 1803, they say, 'that the property of the subjects in ques-'tion, is held in trust for a society of persons, who contributed 'their money for purchasing the ground, and building, repairing, 'and upholding the house or houses thereon, under the name of

* Taken in short-hand by Mr Gurney.

'the Associate Congregation of Perth; and so far repel the de-
'fences against the declarator at the instance of Matthew David-
'son, and others, and find that the management must be in the
'majority, in point of interest, of the persons above described.'
Then they remit to the Lord Ordinary to ascertain what persons are entitled to be upon the list of contributors foresaid, and whether the majority aforesaid, stand upon the one side or the other, and, therefore, to do as to his Lordship shall seem just.

"A reclaiming petition was given in, and, on resuming consideration on the 1st of February 1804, their Lordships altered their interlocutor of the 16th November, which I have just stated, 'and find that the property of the subjects in question is held in 'trust for a society of persons, who contributed their money, either 'by specific subscriptions, or by contributions at the church-doors, 'for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, such persons by themselves or along 'with others joining with them, forming a congregation of Christians, continuing in communion with, and subject to the ecclesiastical discipline of a body of Dissenting Protestants, calling 'themselves the Associate Presbytery and Synod of Burgher 'Seceders.'

"My Lords, before I state the facts of this case, which I shall take occasion to do shortly, but, I hope, clearly, I would call your Lordships' attention to the differences between these two interlocutors. The property in question is a meeting-house for religious worship. The first of these interlocutors states that it was held, 'in trust for a society of persons who contributed their 'money for purchasing the ground, and building, repairing, and 'upholding the house or houses thereon, under the name of the 'Associate Congregation of Perth.' That interlocutor, therefore, with respect to the persons, with reference to whom it asserts the property to be held in trust, describes those persons to be persons who had even contributed their money for purchasing the ground, and building, repairing, and upholding the house or houses thereon. The next interlocutor, bearing date the 1st February 1804, describes those persons to be, 'persons who contributed 'their money, either by specific subscriptions,' meaning thereby, distinct contributions, 'or by contributions at the church-doors, 'for purchasing the ground, or building, repairing, and upholding 'the house or houses thereon, or for paying off the debt contracted 'for these purposes.' That description of persons, 'paying off 'the debt contracted for these purposes,' your Lordships observe, is not contained in the first interlocutor, and the phrase, 'the 'persons who contributed their money,' is qualified by inserting the words, 'either by specific subscriptions, or by contributions 'at the church-doors.' But the material alteration in this inter-

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locutor, the terms of which I have now stated, is as follows: 'Such persons by themselves, or along with others joining with 'them, forming a congregation of Christians, continuing in com- 'munion with, and subject to the ecclesiastical discipline of the 'body of dissenting Protestants, calling themselves the Associate 'Presbytery and Synod of Burgher Seceders.'

My Lords, before I state the facts of this case, and a very important case it undoubtedly is (though it does not appear to me to bear upon the doctrine of toleration in the way in which it has been supposed to bear upon these doctrines), your Lordships will permit me to state, that between 1733 and 1740, upon an occasion which I shall take the liberty of mentioning more particularly in a few minutes, this meeting-house was built. It was built by persons who subscribed sums of money for the purchasing the ground, and building the meeting-house; and it was also built by the contribution of money at the church-doors. It was also built by the contributions of the remainder of the community, who subscribed towards paying off the debt, a very considerable debt having been contracted in this undertaking; and there appear also to have been subscriptions by persons who were not members of this community, but who wished well to the undertaking as a religious undertaking, though they were not in communion with the society engaged in that form of religious worship. Your Lordships will also find the minister has been from time to time maintained by the contributions at the kirk-door, and the building itself was in some degree erected, and has been from time to time repaired with the produce of those contributions at the church-doors.

"If I have correctly called your Lordships' attention to the words of these interlocutors, I think you will see, in one moment, the extreme difficulty of applying to the statements in point of fact, the questions in point of law. No part of the Court seems to me to have denied that there may be a property vested in individuals, it being the intent of those individuals, and that intent being capable of being denominated a trust, that it should be used for the purposes of religious worship, carried on in communion with those who have not subscribed to the property; but, the determinations of the Court have differed in this respect, and your Lordships will observe the difference is marked out by the second interlocutor. The first interlocutor has said that the property is in those who advanced the money, but that, notwithstanding their advance of the money, they lose the benefit arising from the property, if they cease to be in communion with the persons associating there for religious worship. But, taking it one way or the other, when your Lordships observe in whom the property is stated to be vested, it being represented that these contributions have been made from the years 1733, 1736, or

1740, up to the time of pronouncing this interlocutor, in the present century, about 1806, when the Court directs an inquiry who were the contributors? and states in the first interlocutor the contributors, describing them, with this addition in the second interlocutor, that those who subscribed at the church-door, and those who subscribed towards paying off the debt, are to be considered as contributors. Recollecting that the original contribution was as long ago as the commencement of the building of this meeting-house, and that this contribution has been going on by subscriptions and collections ever since; and this interlocutor, taking no notice of their heirs or representatives, I think it would be extremely difficult for the Lord Ordinary to find out who are the persons in whom the property is, so as to apply the interlocutor to them.

"My Lords, the history of this case is certainly very curious. It appears that, about the year 1732, a schism arose in the Established Church of Scotland, of this nature, that is to say, 'One 'party contended that when the planting of any parish should 'fall into the hands of the presbytery, *tanquam jure devoluto*, the 'election of a minister to supply the vacant charge belonged to 'the congregation at large, and not to the heritors and elders, 'who constituted' (as your Lordships know), 'a very small pro-'portion of their numbers.' By the other party it was contended, 'that the right of electing the pastor in similar circumstances, was, 'in a landward parish, by a call by the heritors and elders in 'conjunct meeting; that in the case of vacancies in royal burghs, 'the call should be given by the magistrates, town-council, and 'elders, in a joint meeting, where there was no landward parish, 'and by the magistrates, town-council, heritors, and elders, where 'there was a landward parish.'

My Lords, to the latter opinion, a great majority of the members of the Established Church of Scotland adhered, and, accordingly, it was established by a General Assembly of the Church of Scotland, that such was a proper mode of election. There were at that time four ministers, a Mr Ebenezer Erskine (who seems to have held a contrary doctrine with great firmness), a gentleman of the name of William Wilson, who was the minister of Perth, in the Established Church of Scotland, at that day; another gentleman of the name of Alexander Moncrieff, and another of the name of James Fisher, and to these they associated afterwards two other persons, of the name of Ralph Erskine and Thomas Mair. They stated themselves to be, what they called, an Associate Presbytery, that is to say, they did not mean to depart in any degree whatever, from the form of the communion in the Established Church, but they differed in this point of the election of pastors, and that difference of opinion between 1732 and the time when these causes were instituted, had given rise to 130 congrega-

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tions of Seceders, who had divided themselves in 1745, into another secession of Burgher Seceders, and of Anti-Burgher Seceders.

"My Lords, these gentlemen having separated themselves from the Established Church, held themselves out to be the only true genuine Presbyterians in Scotland, and it is not necessary for me to point out to your Lordships any other doctrines, in respect of which they differed, in order to explain myself to your Lordships, but simply to state, that they adopted the obligation of what is called the National League and Solemn Covenant in that country, of which your Lordships have heard much, and one of the forms which they used, was this (which they added to the formula used by the Church of Scotland). 'Do you acknowledge the perpetual 'obligation of the National Covenant in Scotland, and of the 'Solemn League and Covenant?' This acknowledgment was a sort of principle upon which their communion was to exist, and it seems that a great deal of difference of opinion has taken place since this Secession was formed, about the period I have mentioned to your Lordships, as to what was meant by acknowledging the perpetual obligation of the National Covenant in Scotland, and the Solemn League and Covenant, and those differences of opinion led to another schism and separation, which gave rise to the present suit, in the year 1799.

"My Lords, in the year 1737, or soon after, the Established Church had ejected the ministers whom I have named as ministers not belonging to the Establishment, they formed themselves, with others, into an Associate Presbytery, and it appears, that, in a very solemn form, in the year 1747, this dissenting church at Perth adhered to what they called the Associate Synod. When the ministers, forming the Associate Presbytery, became more numerous, than could conveniently admit all to meet for the purposes of business, there were subdivisions of the whole into distinct presbyteries, and the meeting of the distinct presbyteries formed the Associate Synod. This meeting-house at Perth, I may unquestionably state to your Lordships, as having been originally built, and the ground unquestionably purchased for the purposes of religious worship, by persons who were agreed in their religious principles and persuasions, and who, actuated by those religious persuasions, meant to continue in communion with each other; and when they adhered to the Synod, I think I may also state it as being very clear in point of fact, that they understood, all of them, that this congregation was still to continue in communion, acting upon the same religious persuasions; and that, though from the kirk-session to the presbytery, and from the presbytery to the synod, there was that recourse which, in the judicature of the Established Church, had the same names, yet it was understood, that as their original formation was for the purposes of their common religious worship, they constituted a part of that society which was called

the Associate Synod, it being understood that every presbytery which was Associate, and the whole synod, formed of the Associate Presbyteries, were to continue in communion, actuated by the same principles and persuasions which had occasioned their separation from the Established Church.

" My Lords, I intimated to your Lordships, that there had been a great difference of opinion between many of the members of this seceding church, as to the solemn league and covenant, and particularly with respect to the authority of the civil magistrates; and in a later period, the particular date of which it does not appear necessary to state to your Lordships, they had meetings to consider this subject. The whole body met at last, and they put an interpretation upon it, which several of them thought not agreeable to the obligations they had come under; and the consequence of that was, some of the ministers refused to abide by the opinion of the majority, and among others, one of the ministers of this church at Perth, a gentleman whose name appears in these papers, and with whom there had been associated another gentleman of the name of Aikman. Mr Aikman, the associate of the clergyman of this church, adhered to the opinions of the majority of the Synod. Mr Jervie, who had been long a minister of this church, was of opinion, that they had broken the league, and forsaken the principles, on which they ought to act, and he refused, and a very considerable part of the congregation of this church, at Perth, refused, any longer to adhere to that Synod; and this circumstance, without entering into any more detail of it, has furnished the question in this cause; that is to say, here was a congregation of persons, who, united in religious opinions, who, by contributions of different sorts—contributions of money—contributions of materials—contributions of labour, and contributions at the church-door—had made this establishment in Perth, meaning, undoubtedly, that it should continue as long as they could agree, who had adhered, in the year 1737, to the Synod of these Seceders, meaning to adhere to it as long as there should be a community of opinion; but, in consequence of this difference of opinion in their ministers, and difference of opinion among themselves, instead of uniting in what they considered the leading article of their religious persuasions, one party said—This meeting-house belongs to us, because we continue connected with the Associate Synod. And without entering into the forms of proceedings in Scotland, I may represent this as a case in which one party and its adherents instituted a suit, insisting that the property was in the contributors of money, not of materials, not of labour, not of stipend, not of contributions at the church-doors, but of money advanced at the time for the purposes of making this building, and that they and their heirs have a right to direct the use of the building, when there is no longer an

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agreement among the congregation for the purposes of religious worship, for which this building was originally made. Mr Aikman and his adherents said, that inasmuch as the congregation at Perth had adhered to the Associate Synod in the year 1737, they had therefore submitted themselves to what they called the ecclesiastical discipline of that Synod, and as the majority of that Synod had declared for the principles and tenets upon this point which Mr Aikman, and that part of the congregation maintained, they were no longer to be considered as a separate meeting-house at Perth, but as one of many associated congregations, whose opinions, according to their way of putting it, the Synod, in some sense, must have a right to direct; and that the Synod, therefore, upholding Mr Aikman's pretensions, wherever the legal property was, it must be held in trust for Mr Aikman and his adherents.

"That appears to have been the state of the question. There has, as I before stated to your Lordships, been a very great difference of opinion. My Lord Armadale, as appears by the papers before your Lordships, states himself to have first thought that the property belonged to the contributors, and, that although the law of Scotland was not so wanting with respect to the principles of toleration, as for it to be conceived that a society of this kind could not exist, yet that there were two views of the question; the one was, In whom the property was? and the law would only give the direction and the use of the property to the majority of persons having the property. The opinions of others of the Judges was, that the property, being held in trust for persons united in a religious society, for the purposes of religious worship, the law would enforce the use of the property to the purposes of that society so associated for the purposes of religious worship. But then, another question arose, which was this, If the contributions were made originally for the purposes of a society professing one general faith, and adopting the same principles,—if that society did not remain in the adoption and profession of the same principles, but broke into pieces in respect of their opinions, a difficulty there arose, for whom the property was to be held? and there was a vast deal of argument, in respect both of the English and the Scotch law. With respect to the English, perhaps, I may take the liberty of stating, that they seem, by the papers before the House, to have been somewhat mistaken; and with respect to Scotch law, many of the judges, who concurred in the interlocutor, admitted very distinctly, I think, that the decision was not according to the former decisions in their Courts, but, that at present they ought to entertain more liberal views; and in respect to others again, they contended that the decision was according to the former decisions, and that they were only enforcing that doctrine, which they had laid down in antecedent cases. One question, which seems to have been pressed, and upon which

most of the judges delivered their opinions, was this, Supposing the whole of this congregation at Perth, had thought proper to alter their opinions, could it then have been contended, that the Synod could have prohibited the use of this meeting-house, which was a meeting-house formed for the purpose of carrying on religious worship according to the notions of those who contributed? The only answer which has ever been given to that question, as far as I can find one in these papers, is, that whenever that question arises, they will dispose of it. But, my Lords, it is a question which I am afraid must be disposed of, before we can be quite sure what is the right decision in the present case, because, though it is putting a strong case, you must determine what the decision upon that would be, before you can decide, whether the decision is right in the present case. At present we do not know where the majority is, but we must take it in all its stages. Supposing the congregation should be equally divided, if my Lord Ordinary has to apply this interlocutor, what can be done then? Supposing the whole congregation had altered its opinion, or that it should be found that ninety-nine in a hundred of them had altered their opinion, is it to be contended that those ninty-nine hundredths had forfeited, not only their right to be a part of the congregation, but their property in the place?

"My Lords, when I come, therefore, to look at these interlocutors, I protest I find it impossible in any view of the case, to abstain from most respectfully submitting again to the consideration of the Court of Session, not only the nature of the opinion, but the application of the principle they have stated to be contained in these interlocutors. Mr Maconochie, in the paper I have in my hand, contends that the contributors are not only the persons who supplied the specific money, but those who supplied the materials, who supplied the labour, who supplied the contributions at the church-doors, and who have, from time to time, contributed to the stipend of the minister. That the contribution to the stipend of the minister he insists upon very largely, and very ably, and I observe the present Lord President, who was then Lord Justice-Clerk, insists in his judgment very ably upon the point, that those who contributed to the minister's stipend, are to be reckoned among the contributors; but there is not one single syllable of this in the judgment of the Lord Ordinary; and if he and others were of opinion, that those who contributed to the stipend were to be considered as contributors; and if your Lordships look at the terms of the interlocutor, and see that such persons are absolutely excluded, there arises a new difficulty for the Lord Ordinary.

"But, in another way of putting it, when you consider that this body for religious worship was formed so long ago, as between the year 1730 and 1740; that between 1730 and 1740, the sums

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which were subscribed for the purposes of the building were subscribed, and that the individuals of that day, every one of whom must have contributed towards the carrying on the worship there, when you consider, that those contributions at the church-doors, which are spoken of in the second interlocutor, have been made almost quarterly from that time—when you consider, that the stipend has been from time to time supplied through all this vast course of years—when you connsider, that the debt which was contracted, and which the last interlocutor says 'every per-'son contributing towards the payment of is entitled,' &c.—and when you consider, who are meant to be described in this interlocutor, I think I may ask your Lordships, whether you can solve the difficulty which you would find yourselves under, if it was referred to you to state who are the persons who contributed their money, either by specific subscriptions or by contributions at the church-doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, that debt having been paid off many years ago, and then to state who are the majority of them, with a view for the Court to determine for whose benefit this place is to be considered as held by the survivors of four sons, to whom it was conveyed between the years 1730 and 1740. My Lords, it does appear to me, that in any way of looking at these interlocutors, independently of the great importance of the principle which is involved in them, the house will find itself utterly unable to apply the interlocutors, according to the terms they have used, so as to execute them; and, therefore, independently of all other considerations, I do not see how it is possible to refuse to remit this case for further consideration. If, on further consideration, the learned judges adhere to the principle, that this place was vested in trustees for the benefit of the society adhering to certain religious principles, and that because that society adhered to the Synod in 1737, that Synod, at the sametime, possessing certain religious doctrines, and certain religious principles, the property is now to be held not for those of that congregation who adhere to their original principles, and the original doctrines to which they agreed, but in trust for those who do not adhere to the original doctrines and the original principles, but to that change, as they call it, of doctrine, which the Synod has introduced—propositions of law, in my opinion, extremely difficult to be maintained; if they shall adhere to those propositions, I conceive, there is an utter impossibility in applying that principle by interlocutors worded as these are.

"My Lords, upon the doctrine itself I will only state, with respect to the English law, to which the attention of the Court of Scotland has been called in some degree, I have no doubt if it leaves an estate in trustees to be used for the purposes of religious

worship, the Courts of this country acting upon the principles of toleration, will enforce those persons to permit the property to be used for the purposes of that religious worship to which it was devoted. If the instrument contains in it a provision for the case of schism and separation among the members themselves, I apprehend the Courts themselves will act according to the provisions so contained; but I have not yet met with a case that authorises me to say, that it is as clear as the Court of Scotland appears to think it, that if we have an instrument of trust, devoting property to purposes of religious worship, and making no provision for the case of schism or separation, that property being acquired by the trustees, at the expense of the *cestui que trusts*, and being acquired for the benefit of the *cestui que trusts* in matters of religious worship, in which they are all interested, I have not found a case which authorises me to say, that if that society should separate from each other in point of religious opinion (and I particularly beg my learned and noble friends attention to this), a court in this country would enforce the trust for the benefit of those, not who have adhered to what was originally the religious principle upon which they founded the church, but for the benefit of those who appear to be a mere majority (if they were a majority), much less if they were a minority, much less for the benefit of those if they were not one to ten (which is the principle which must be considered as running through these interlocutors), not adhering to the principles upon which the society was formed, but departing from them, and that in point of pecuniary interest, those who adhered to their original principles, should forfeit all their property, and those who departed from their original principles should, notwithstanding that departure, not only have their own property in the meeting-house, but the property of the other original subscribers. I have found no case whatever which authorises such a decision. If it can be made out, that this society originally said this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Presbytery, and afterwards of the Associate Synod; and placing ourselves under the jurisdiction of the Associate Synod, we agree that the Associate Synod shall direct the application of this place so built, that is matter of law, and the contract will apply to the law. But I have found no such contract, and upon the fullest consideration I have been able to give to the subject, I propose, when we meet on Wednesday morning, to move your Lordships that this should be sent back to the Court of Session, with two findings, which the circumstances of the case, I think will authorise me to propose to your Lordships; the one, that it appears in matter of fact, that this house and ground was originally purchased and built, and the property vested in four persons, for the purposes of religious worship, by indi-

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viduals united in their religious principles and persuasions, and proposing to continue united in such principles and persuasions; but, *secondly*, that it does not expressly appear as matter of fact (I will not say impliedly, for that must be left to the Court, but that it does not expressly appear) to what purposes it was the interest of all these individuals, or any of them, should be applied if they should happen to differ in opinion; and with these findings, the one affirmative, and the other negative, I shall propose to your Lordships to remit these two interlocutors, upon which I have observed, to the Court of Session.

"My Lords, I am the more anxious that this course should be taken, because I have stated to your Lordships that many of the judges in Scotland consider this decision as directly contrary to all their former decisions, and because some of them admit the extreme difficulty of reconciling this to their former decisions, who still concur in it; and lastly, because, I think your Lordships will see the nature of the case itself renders it a case of great importance, and from the nature of the question which the case furnishes, it has this peculiar importance about it, that it naturally engages the feelings of the persons who are interested in the question in such an extreme degree, that it is extremely important it should be as satisfactorily settled as it can be. Under these circumstances, and meaning to propose these findings to your Lordships on Wednesday morning, move the further adjournment of this appeal to that time."

The Lord Chancellor read his note of the judgment on Wednesday, and then proceeded thus:—

"I will not again repeat the grounds which I stated very fully to your Lordships on Monday, for this form of judgment. I have nothing to add but this, that on reconsidering the matter, it does not appear to me, that if this were a case of an English trust, and I mention English trust again, because I see there is a great deal of discussion in the Court of Session, upon what they consider the English law, with reference to trusts of such a subject. I do apprehend, there is no case that we have had, that would authorise me to say, that if persons had subscribed to the building a meeting-house for religious worship, and if those persons afterwards disagreed in opinion, you would compel the execution of the trust for the purpose of carrying on the religious worship of those who had changed their opinion, instead of executing that trust for the benefit of those who had adhered to their religious opinions. I know of no case which has gone that length. When I speak of religious opinions in such a case, I would state that the Court here would examine what were the religious opinions, merely as a matter of fact, not for the purpose of stating which of them con-

tained more, and which of them contained less, of sound doctrine, but as mere matter of fact, in order to get at the intent and purpose with which the property was purchased, and the building was erected; and when it got at that intent and purpose, it would either effectuate that intent and purpose, or say that it failed altogether. With these few words with respect to our own law, I propose to your Lordships the judgment in the form in which I now read it."

When the cause returned, the appellants presented a petition to the Court of Session to have the judgment applied. This being done, a condescendence was lodged, which, being followed by answers, replies and duplies, the Court pronounced this interlocutor:—"The Lords find that the pursuers, James Feb. 21, 1815.
"Craigdallie and others, have failed to condescend upon any "acts done, or opinions professed by, the 'Associate Synod,' "or by the defenders, Jedidiah Aikman and others, from "which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the said "defenders have deviated from the original principles and "standards of the Associate Presbytery and Synod. Farther, "find that the pursuers have failed in rendering intelligible "to the Court on what ground it is that they aver, that there "does at this moment exist any *real* difference between their "principles and those of the defenders; for the Lords further "find, that the Act of Forbearance, as it is termed, on which "the pursuers found, as proving the apostacy of the defenders "from the original principles of the Secession, and the new "formula, were never adopted by the defenders, but were "either rejected or dismissed as inexpedient, and that the "preamble to the formula, which was adopted by the Associate "Synod, in the year 1797, is substantially, and almost verbatim, the same as the explication which the pursuers proposed in their petition of 13th April 1797, to be prefixed "to the formula; and to which, if it would have satisfied "their brethren, they declared they were willing to agree; "therefore, on the whole, find it to be unnecessary now to "enter into any of the inquiries ordered by the House of "Lords, under the supposition that the defenders had departed from the original standards and principles of the "Association, and that the pursuers must be considered "merely as so many individuals who have thought proper, "voluntarily, to separate from the congregation to which "they belonged, without any assignable cause, and without "any fault on the part of the defenders, and, therefore, have

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"no right to disturb the defenders in the possession of the "place of worship, originally built for the profession of prin- "ciples, from which the pursuers have not shown that the "defenders have deviated, therefore, sustain the defences, "and assoilzie; and in the counter action of declarator, at "the instance of the defenders, J. Aikman and others, "decern and declare in terms of the libel, but find no ex- "penses due to either party."

Against this interlocutor the present appeal was brought by the pursuers to the House of Lords.

Pleaded for the Appellants.—What points it was your intention that the Court below should take into consideration upon your remit, it is for your Lordships now to say, but, till corrected, the appellants must hold that the Court has completely misunderstood the judgment. By the interlocutor appealed from, it appears that the Court thought it within their province to consider whether there were substantial grounds for difference in opinion between the parties, in matters of religion and church discipline, and they declared that, according to their understanding, there were not. But, the appellants conceive, that your Lordships could have no such idea. It being indisputable, that the body had split, that some of them did adhere to their original principles and persuasion, and others of them did not, and at any rate that they had ceased to continue in communion with each other, and had in part ceased to adhere to the Associate Synod, the Court could do nothing but pronounce what was law on the facts so established, or how these facts were to operate on the question as to the right to the property. It was not the object of the respondents to be intelligible to others; and in fact they succeeded in not being understood for a time by their own people, but their real aim came soon to be seen. They did not pass a formal Act of Forbearance, *but they recommended their presbyteries to forbear*, and when they tacked to the formula what is called the preamble, they *covertly* did all originally proposed to be done *openly*.

In the *second* place, throughout the whole of these proceedings, your Lordships must be satisfied that the appellants, and those who have acted with them, were invariably the advocates of the existing order of things; that they sought for no change or alteration upon the existing bond of the society; that they were not the authors or abettors of controversy; and that they sought for nothing more than to be allowed to remain in the undisturbed possession of that

common faith which had been transmitted to them by the founders of the Secession, and which, by those founders themselves, had been derived from what was regarded as the purest and most prosperous era of the Scottish Church. Indeed, it was never at any time seriously pretended that the appellants aimed at anything more than a strict adherence to their own established standards.

In the *third* place, it is said that this preamble must surely be innocent, and can import no change, since it is really no more than equivalent to that explanation which the Associate Session of Perth had proposed in their petition of 1797. Without going back to the history of that document, it may be sufficient to the appellants to show, that between the preamble and the proposed explanation, there is a most essential difference. It is to be kept in mind that the main pretence for altering the established formula, as it related to the powers of the civil magistrate, in matters ecclesiastical and religious, was, that it might be made to countenance persecution for conscience' sake, in its most odious and intolerable forms. Now, without abandoning a single iota of the Confession of Faith, or the existing formula, no well-informed Seceder could hesitate a moment to disavow so gross and malignant a construction, and, instead of abandoning and altering the standards, he was only disencumbering, and vindicating them from a gross and stupid calumny. In short, under the vague and comprehensive name, compulsory measures in religion, a direct blow was aimed at the authority of the magistrate, in all matters ecclesiastical and religious. The respondents, therefore, having thus departed from the established standards of the Secession Church, while the appellants adhered to them, the appellants ought to have right to the meeting and session houses, as the only body remaining in communion, and adhering to the original principles of the Associate Burgher Seceders. These principles were identical with the ecclesiastical establishments of the Scottish Church, as set forth in its own standard books, from which they never *dissented* at the time they seceded from that church.

Pleaded for the Respondents.—1st, It is established by the existing judgment of this House, "That the ground and buildings in question were purchased and erected, with intent "that the same should be used and enjoyed for the purposes "of religious worship, by a number of persons agreeing at "the time in their religious opinions and persuasions, and, "therefore, intending to continue in communion with each

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"other; and that the society of such persons acceded to a "body termed in the pleadings, 'the Associate Synod.'"

2d, The appellants are no longer in communion with this body, but have thrown off their submission to, and connection with it, and have thus lost all title to derive benefit from the trust question.

3d, The respondents, on the contrary, have all along been, and still continue, in communion with the Associate Synod.

4th, The Associate Synod has not openly renounced or directly deviated from any of the original principles of the Secession; but, on the contrary, the proposed alteration of the formula, which is the only ground for inferring a change of religious persuasion, against this body, was expressly rejected. Although the preamble was adopted, this prefatory explanation was perfectly consistent with the strictest principles of the Burgher Association, and was proposed and supported by the appellants themselves, who, consequently, are debarred from converting the adoption of this explanation, as a ground of preference to them over the respondents.

After hearing counsel,

It was ordered and adjudged that the interlocutor be, and the same is hereby affirmed.

For the Appellants, *Ar. Colquhoun, Tho. Thomson, Fra. Horner.*

For the Respondents, *Alex. Maconochie, H. Cockburn.*

1820.

GOVERNORS OF HERIOT'S HOSPITAL. v. ROSS.

[Ross' Land Rights, vol. ii., p. 193.]

GOVERNORS OF GEORGE HERIOT'S HOSPITAL, ... *Appellants;*

JOHN COCKBURN ROSS, Esq., . . . *Respondent.*

House of Lords, 24th July 1820.

SUPERIOR AND VASSAL—SUB-FEUS—COMPOSITION ON ENTRY.

This was an action raised by the respondent, who had purchased, many years ago, the ground now covered by Shandwick Place and Queensferry Street. Originally he had obtained charter from the appellants, his superiors, on paying a composition of £32, being the sum corresponding to the real rent of the ground and houses erected thereon.

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Since then, he had feued out the whole ground for building, gaining thereby a yearly return in sub-feu duties, of the sum of £428, 11s. 8d., from the sub-feuars, besides taking them bound to pay a *duplicando* of the feu-duty on the entry of every heir and singular successor.

Intending to alienate his whole original feu, the respondent demanded of the appellants to give entry to his disponee, a singular successor, on payment of £430, being one year's sub-feu duty. This the hospital declined, unless he would pay one year's sub-feu duty, and also one year's average value of the whole profits derived by the respondent from his sub-feus, by casualties, or any way whatever.

Action having been raised by the respondent against the Governors of the Hospital, in defence the appellants stated that, in point of fact, the sub-feu rights, said to have been granted, were executed without their consent or concurrence. That in this situation their rights as superiors could not be affected by these sub-feus, but must continue entire, as if such sub-feus had never been granted; that the respondent, therefore, must continue liable in the legal full casualty due to the appellants, his superiors, which, upon the entry of a singular successor, is by law fixed at a full year's rent of the lands, according to the value of the same, at the time the entry is granted, and without distinguishing whether such rent proceeds from agricultural produce, or from buildings.

The Lord Ordinary (Meadowbank) pronounced this interlocutor: "Finds, that by the pursuer's titles from the Nov. 12, 1813.
"defenders, he was under no restraints from sub-feuing,
"and that the sub-feus he granted, it is not controverted
"by the defenders, were made for a full and adequate avail
"of the subject, computing feu-duties and casualties only,
"and created an immense improvement in the produce
"thereof, advantageous for the superior he held of, as well
"as for himself; finds that a purchaser, or adjudger, from
"the pursuer will be entitled to obtain an entry from the
"defenders on paying the free income of the estate ac-
"quired by him during the first year of his access to the
"possession thereof; and that the defenders have no title
"to exact from him any composition according to actual
"or hypothetical rents, payable to, or enjoyed by, the sub-
"feuars, and decerns and declares accordingly; finds the
"pursuer is entitled to the expense of extract, but no other

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"expenses hitherto incurred, and dispenses with any repre-"sentation." *

On two several reclaiming petitions to the Inner House, the Court adhered.†

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

The LORD CHANCELLOR (ELDON) said,

"My Lords,‡

"Before your Lordships proceed in the further discussion of the case of the Duke of Hamilton and Mrs Scott Waring, I will take the liberty of calling your attention, in a single word, to the case of the Lord Provost, Magistrates, Ministers, and Council of the city of Edinburgh, Governors of Heriot's Hospital, and John Cockburn Ross. My Lords, this is a case of great importance, and of no small difficulty. Since it was heard before your Lord-

* Note by the Lord Ordinary:—

"The Lord Ordinary conceives it quite desperate of the defenders to think they are to get the better, in a question as to the rights of superiority, of the authority of Stair, Bankton, and Erskine, without an adverse authority of any description; even Craig being also hostile. It was slowly, and with difficulty, he apprehends, that in feu holdings a *duplicando* was exigible from heirs, without a stipulation for that purpose in the contract, or charter, because it was the feeling of the country, as Stair gives it, that feus were locations affording a superior security for the profits of the lands to personal or temporary leases, and were not proper fees, admitting of such severe casualties. But this came to be established, though, as appears from Elchies' Dictionary, with decisions adverse to it. In fact, the feudal law gave no authority for it. The entry, then, of a singular successor could only be thus taxed by virtue of the statutes authorising comprisers, &c., to compel an entry, as stated in the memorial for the pursuers; and of course it is not a feudal casualty, but a statutory payment for completing an alienation, and must be interpreted accordingly. In a proper feudal casualty, the superior is not affected by what he has not consented to; but, can it be believed or argued, that, in order to obtain an entry to an estate of £400 per annum, the statute meant to authorise a payment of £4000, to be exacted by a superior; or, can it be believed, that ever the country has so understood the statutes, and submitted to it without even a question."

† For opinion of judges, *vide* Fac. Coll., vol. xviii., p. 402.

‡ From Mr Gurney's short-hand Notes.

ships, I have very frequently given the most laborious attention to it, and the result of that attention, repeatedly given, is that I cannot find reason for offering to your Lordships, as my opinion, that you should disturb the judgment. It is, undoubtedly, a case of very great importance, and a case of great difficulty; but, upon the best judgment I can give, I think the majority of the judges have decided rightly. I shall, therefore, trouble your Lordships by moving to reverse the judgment, putting that question according to the usage of the House, meaning, at the sametime, to vote for the affirming it."

It was accordingly ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are, hereby affirmed.

For the Appellants, *John Leach, J. H. Mackenzie.*

For the Respondent, *Sir Saml. Romilly, H. Cockburn.*

JOHN GEDDES, of the Verreville Glassworks, and formerly Manager of the Glasgow Glasswork Company, ... *Appellant;*

ARCHD. WALLACE, for himself and the other Partners of the Glasgow Glasswork Company, ... *Respondents.*

House of Lords, 24th July 1820.

PARTNERSHIP—LIABILITY OF PARTNER.

The appellant was formerly manager of the manufactory of glass, called the Glasgow Glasswork Company, and, besides his salary, he was allowed, as a part of his remuneration, a share of the profits of the business, without being required to advance any capital. At the distance of many years, after the appellant had quitted that situation, a claim was brought against him for payment of a share of loss, said to have been sustained by the proprietors of the Glasswork, in winding up the undertaking, after the sale of the establishment.

The appellant, conceiving that he had been merely received as a partner, in subserviency to his character of manager, and that having brought no capital into the stock of the company, and being liable to be dismissed at pleasure by the company, that he was not liable for the alleged ultimate loss of the capital. The Court of Session held him liable for his share

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GEDDES v. WALLACE, &c.

Vide Journals of the House of Lords.

of the loss, as a partner. In the House of Lords this was reversed, holding, "That the appellant ought not to be con- "sidered *as between him and his partners*, as a partner liable "to any share of the loss."

For the Appellant, *Robt. Forsyth, Fra. Horner.*

For the Respondents, *R. Gifford, John Cunninghame.*

1820.

THE DUKE OF HAMILTON, &c. v. ESTEN, &c.

[2 Bligh, p. 197.]

His Grace the DUKE OF HAMILTON, and MARQUIS OF DOUGLAS, his Commissioner, *Appellants;*

MRS ESTEN, now Wife of SCOTT WARING, and him for his interest, ... *Respondents.*

House of Lords, 24th July 1820.

ENTAIL—POWER OF LEASING—EXERCISE OF THAT POWER—HOMOLOGATION—TURPE PACTUM.

Leases were granted by the late Duke of thirty or forty of his farms, at a rent less than two-thirds of their value at the time, and less than one-third of their present value, to John Boyes, the Duke's own confidential factor, who sub-let them, deriving a yearly surplus, or increase of rent, of £1376. These leases were let for the period of twenty-one years. The entail contained a prohibition against *alienating.* It permitted leases, but not to exceed twenty-one years' duration, and they were not to be let "*with evident diminution of* "*the rental.*" Accordingly, it was stated, the above was a device formed to hurt the succeeding heirs of entail, and to benefit the respondent, who had lived with the Duke, and had begot him a daughter. An obligation under the hand of Mr Boyes was adduced, stating that it was agreed between the Duke and him, that he should hold whatever increase of rent he might derive from the sub-letting, or assigning, these leases, in trust for behoof of the said Mrs Esten, and her daughter, Ann Douglas Hamilton, and any other child or children that may be procreated between the said Duke and her, "and she has further reposed in "me the trust and charge of collecting the surplus money "rents." After the Duke's death, in 1799, the present Duke, ignorant of his rights, acquiesced in Boyes so appro-

priating these rents, until his death, in 1812, when actions were brought by the respondent which induced the appellants to bring a reduction of the leases in question. This was done on two grounds, 1st, That the cause of granting these was illegal, namely, to induce Mrs Esten to live with the late Duke. 2d, That by the entail under which he enjoyed the estate, leases "with evident diminution of the rent were "prohibited." The Court of Session decided the case on the first ground entirely, considering that the appellants had no case on the second ground, and decided, that, in so far as regarded the daughter, the leases were unexceptionable, and in reference to Mrs Esten, her mother, it did not appear that they were granted with the view of her entering into, or continuing in, an improper course of life, but as compensation for injury and loss incurred.

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THE DUKE OF HAMILTON, &c. v. ESTEN, &c.

Against these interlocutors the present appeal was brought.

After hearing counsel,

The Lords find, that the leases in question were not warranted by the power contained in the deed of entail, and therefore subject to reduction, unless the same were homologated by the late appellant, Archibald, Duke of Hamilton, deceased, and by the appellant, Alexander, now Duke of Hamilton; and so far as the same were not so homologated, respectively, it is ordered and adjudged, that the interlocutors complained of be reversed; and it is further ordered that the cause be remitted back to the Court of Session, to review the same, subject to the above finding.

For the Appellants, *John Clerk, W. Hamilton.*

For the Respondents, *Alex. Maconochie, Sir Saml. Romilly, J. Blackwell.*

[Before the Lords' Committee of Privileges.]

1821.

ST ALBATHMORE PEERAGE CAUSE.

Petition and Case of JOHN BOWES, an infant, claiming the titles, honours, and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, &c.; and

Counter Petition and Claim for THOMAS BOWES, brother to the late Earl (tenth Earl) of Strathmore, claiming the same titles, honours, and dignities.

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STRATHMORE PEERAGE CAUSE.

House of Lords, 29th June 1821.

MARRIAGE—LEGITIMATION PER SUBSEQUENS MATRIMONIUM—DOMICILE.—The late Earl of Strathmore was born in England. He had a house in London, and had estates in England. He had also estates in Scotland, and a mansion-house and servants there. He had formed an illicit connection with Miss Mary Millner, who was English, and lived with him in London, and had born him two children there, the eldest being a son, John Bowes, the claimant, the other a daughter. At the latter period of his life, when on deathbed, he procured a license from Doctors' Commons, and married Mary Millner, according to the English forms, in order to legitimate his children, having previously conveyed his English estates to John Bowes. The questions were, 1st, Whether the marriage celebrated on deathbed was good. 2d, What was the deceased's domicile. 3d, Whether his domicile being in England, did not effectually bar the operation of the Scottish rule of law of legitimation, by the subsequent marriage of the parents. Held that he was domiciled in England, and that such rule did not apply.

In the year 1805, or about that time, John Bowes, the late tenth Earl of Strathmore, entered into an illicit connection with Miss Mary Millner; and in the month of June 1811, she was delivered at Chelsea, in Middlesex, of a male child, whom the Earl adopted; and on the 29th of June in that year, the child was baptized at Chelsea, in the County of Middlesex, by the name of John Bowes, son of John and Mary Millner. Mary Millner was born in the year 1787, at Barnard Castle, in the County of Durham, of English parents, and she always resided in England. The child John was brought up and always resided in England, and neither he nor his mother, Mary Millner, had ever been in Scotland.

In 1817, the said tenth Earl executed a will of his English estates, "to John Bowes for life, my son or reputed son, who "was baptized in the parish of Chelsea, on or about the 29th "June 1811, by the name of John Bowes," with remainder to his issue tail male, and in failure of such issue, to the eldest, and every other son of the Earl's brother, Thomas Bowes.

In 1820, he fell into a severe disease of dropsy and water in the chest. For many weeks previous to his death, he was bedridden in his house at Conduit Street, where Mary Millner was resident with him. On the 1st July 1820, his Lordship sent for Mr John Dean Paul, Banker in London.

On Mr Paul's arrival, he found the Earl sitting upright in bed, supported by Mary Millner, his legs and body being much swollen, and in an advanced state of dropsy. His Lordship, in apparent haste and great agitation of mind, stated to Mr Paul that he wished to marry Mary Millner, that he could not rest until it was done, that he wished Mr Paul's assistance therein, in obtaining a special licence for the marriage in his own house; and he further requested Mr Paul to write a codicil to his will, and give to himself a legacy of £10,000, and a codicil dated the same date, 1st July 1820, was accordingly proved in the Ecclesiastical Court.

Mr Paul immediately applied to the Bishop of Canterbury, for a licence, but was refused. He then made an application to Doctor's Commons for, and obtained a licence to celebrate the marriage in the common form of the church.

About eight o'clock on the following morning (Sunday, 2d July 1811), the Earl of Strathmore was carried from his bed-room by two men, and placed in a sedan-chair at the door of his house in Conduit Street, from whence he was carried to the church of St George's, Hanover Square, London, and set down as near the altar as possible. The rector of St George's having asked if he was desirous that the ceremony should proceed, and his Lordship having replied in the affirmative, the marriage took place according to the usual forms; and having been carried back to his bedroom, he died next day, 3d July 1811.

These are the facts, out of which the present competition arose, for the honours and dignity of the Earl of Strathmore.

John Bowes, the infant claimant, claimed on the ground that his father, the late Earl, must be viewed as domiciled in Scotland, and that, by the subsequent marriage of his parents, he was legitimated to the effect of succeeding to the titles, honours, and dignities of the Strathmore peerage, as a lawful born child.

The claim was thus made to rest upon the rule in the Scottish law, by which children, though born out of wedlock, become, upon the marriage of their parents, legitimate children, and to be so viewed in every question of *status* and succession.

Validity of Marriage on death-bed.

But 1st, An objection *in limine* was stated by Thomas Bowes, which struck at the validity of the marriage itself, celebrated in the manner above-mentioned. It was stated that the marriage contracted, as this was, on deathbed, when the Earl was incapable, either of consummation, or looking

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forward to that *consortium vitæ*, which forms the essential object of the contract, could not be valid or effectual. But, according to the canon law, which, on this point, is also the law of England, such a doctrine, the infant claimant contended, was unfounded. An absolute inability to consummate, arising from original defect in the constitution, or supervenient accident or malady, from which recovery is physically impossible, is held to annul marriage; but no disease, from which recovery is physically possible, although it should actually end in the death of the patient, nor any period of life, even the most advanced old age, is held an impediment to the connexion. A marriage *in articulo mortis*, is good, according to the express text of the law, in whatever state the body may be, if the mental faculties are entire; and and on this all the commentators are agreed. *Vide* Perez., tit. C, de Nat. Lib.—Inst. tit. ff. de Concub.

The same doctrine is laid down by the younger Voet, in his excellent commentary on the Digest: "Nihil autem "interest ad effectum legitimationis quo tempore nuptiæ "subsequantur, adeo ut vel *in agone mortis* interpositæ, "sobolem antea editam efficiant legitimam, dum quisque "matrimonium inire valet quamdiu vivit. Arg. Novell. 74. "Si modo nostris moribus solemnia nuptiarum adhibeantur, "aut super his dispensatio obtenta fuerit."

Craig, L. ii., Dieg. 13. § 26.

Accordingly, from a passage in Craig, mentioned in the case of the Master of Sempill and Joanna Hamilton, it appeared that the Master of Sempill was carried to church when on deathbed, and married for the purpose of legitimating his son.

Domicile in England.

2d, But as to the legitimation of the claimant, John Bowes, by the subsequent marriage of his parents, this further objection is stated, that the late Earl of Strathmore was domiciled in England, when the claimant was born, and also when his Lordship's marriage to Miss Millner took place,—that the Earl was himself born in England, was educated there, entered the army, and although he possessed estates in Scotland, where, at Glammis Castle, he had a mansion house, and kept up a suit of servants, yet he also possessed estates in England, and a house in London; and, further,—that the marriage was celebrated in England, and, consequently, it was to be inferred that the *status* of the claimant must be determined by the law of England, where such rule of legitimation does not prevail.

There were, therefore, two propositions involved in this

plea, 1st, That the legitimacy of a party depends on the law of the domicile where he was born, or rather where his parents were domiciled at his birth. 2d, That the legitimacy of a party depends on the law of the place where the marriage of his parents was celebrated.

1st, Let it be considered, in the first place, if the *status* of a person with regard to legitimacy, is determined by the law of the place where his parents were domiciled at the birth. For a definition of domicile, Mr Bowes refers to the well-known rescript, L. 7, C. *de Incolis*:—"Et in eodem loco "singulos haberi domicilium non ambigtur ubi quis larem "rerumque ac fortunarum suarum summam constituit," &c. Neither that authority, however, nor any other in the Roman law, can be of the smallest avail to him, in support of his claim. The sole purpose for which the above definition of domicile is given in the code, is to distinguish the municipality in which a person, according to the Roman law, was held as a *civis* from the municipality in which he was held as an *incola*. In both municipalities he was qualified to receive public honours, and in both it was incumbent upon him to execute public offices, and to pay taxes. In both, he was amenable to civil and criminal jurisdiction. But the former character was radical and indelible; while the latter was changeable at pleasure, at least it was so, if the change was not made fraudulently or intempestive. But, the late Lord Strathmore was a citizen or subject of Scotland, that was his "forum ad honores capessendos, ad onera ferenda, ad munera "subenda;" and the circumstance that he might enjoy similar advantages, and have similar duties to perform in consequence of a voluntary domicile some other where, did not, according to the principles of the Roman law, dissolve or weaken his connection with the country, not, indeed, of his birth, but of his origin. On the contrary, wherever the full exercise of the rights and duties of a municeps was competent and incumbent, and where he was amenable, as such, to the law and the magistrates, it mattered not whether the tie was formed by the one circumstance or the other. See Joan Voet, tit. ff. ad Municip., and the other commentators on that title.

If the rules of the Roman law were to be applied, therefore, to the present case, the infant claimant, John Bowes, contended that the connection of the late Earl with Scotland, would have been held to be greater than his connection with England, because the character of *incola*, which arises from

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domicile, is less permanent and indelible than the character of *civis*, and arises from an original capacity of honours, and an original liability to public functions and public burdens.

As it cannot be presumed that any one wishes two different modes of distribution to take place, it follows that no person is held to have two domiciles in modern international law. But the rule refers solely to the case of intestate succession; for, as by the Roman law, a person might have two or more domiciles *ad capiendos honores et subeunda munera*, that is, two domiciles of honour and office; so, in modern international law, there is no reason why a person may not have two domiciles with regard to every other interest except intestate succession; and this is agreeable to the doctrine of the jurists of the highest name.

Questions concerning personal *status*, are totally unconnected with those which regard intestate succession, and depend on principles essentially different. Status according to the definition of Vinnius, "est personæ conditio aut qualitas "quæ efficit ut hoc vel illo jure utatur, ut esse liberum, esse "servum, esse ingenuum, esse libertinum, esse alieni, esse "sui juris." Vin. ad tit. I. de Jure Per.

By what law such questions shall be determined is a subject of much contention among modern jurists; and there are scarcely any two writers of authority who agree on the subject. Distinction has been taken between *statuta realia* and *statuta personalia*, and even a third has been added *statuta mixta*. The first always primarily and directly attach on property heritable or moveable. The second are laws attaching on persons directly, though occasionally affecting property as connected with personal status; and the third are laws which relate to forms and solemnities, whether judicial or extra-judicial, sanctioned by authority, for the purpose of constituting, transmitting, and dissolving rights. The *statuta realia* do not operate beyond the territory of the maker. The *statuta mixta* do operate, in most cases, beyond the territory. But in regard to the *statuta personalia*, or those which regulate *status*, there has been great diversity of opinion. One opinion was, that personal *statuta* universally operate *extra territorium*, so that every quality of *status* impressed on an individual in the place of his domicile, accompanies him and takes effect wherever he goes.

Although, therefore, the marriage of the late Lord Strathmore to Miss Millner, did not legitimate the claimant in England, that is no reason why that marriage ought not to

operate beyond the territory of England, so as to legitimate the claimant in Scotland, and render him capable of succeeding to honours, offices, and heritable estates situated in Scotland, where he possesses every quality necessary to create the legal character of heir.

2d, A second plea is set up by Mr Thomas Bowes, namely, that because the marriage of the claimant's father and mother was contracted in England, it cannot have the effect of legitimating the claimant. This point will require little consideration. If Mr Bowes adheres to this plea, he must, as already observed, abandon that on which he chiefly relies, namely, that *status* is regulated by *domicile*, for there is no connection between the *forum domicilii* and the *forum contractus*, their laws are entirely different; it is inconsistent, therefore, to maintain that both should determine. But, in truth, the *forum contractus* never is resorted to, except to ascertain whether the marriage is well constituted or not; the *effects* of the relation must depend on a totally different principle, namely, the law of the country where it is to take effect. Was it ever maintained, because an English couple was married at Gretna, that the wife imported into England a right to the terce and *jus relictæ;* or that the husband could claim a *jus mariti* of the nature established by the law of Scotland? A Gretna marriage is good in England, only in so far as matter of solemnity is concerned, on the principle, universally admitted, that *statuta mixta exeunt territorium.* In further proof of this, the claimant may appeal to the decision of the Scottish judges, finding unanimously, and after much deliberation, that an English marriage is dissoluble by the Commissary Court in Scotland, if the parties have a *forum jurisdictionis* there. If the English judges, on the other hand, decided that the Scottish divorce, in these cases, did not operate in England, a decision by no means incompatible with the judgment of the Court of Session, and in perfect uniformity with the doctrine of the Voets, of Gaylus, and Perezius; what is this but another more striking and authoritative precedent in favour of the claimant, John Bowes' plea?

Hon. Thomas Bowes' Case.

In answer to the above case of the claimant, John Bowes, it was pleaded by the Honourable Thomas Bowes.

1st, That the domicile of John Bowes, tenth Earl of Strathmore and Kinghorn, and Baron Bowes, was in England, and not in Scotland.

The principles of law upon the subject of domicile are very

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clearly and decidedly fixed in relation to both divisions of the island, in the case of Ommannay *v.* Bingham. Though Sir Charles Douglas was by birth a Scotchman, yet he had, for the most part of his life, been abroad on foreign service, and in the naval service of his own country; and had frequently visited Scotland, and at one time had staid near a twelve-month there, where he also died; it was nevertheless decided that the *forum originis* was abandoned and lost, and as his chief and most permanent residence had been in England, where he possessed a lease-hold house, the preponderance of incidents in his life and habits was such, as to fix on him the *status* and character of a domiciled Englishman. This was decided upon the principles of general law, and has ever since been held as a ruling decision in both countries.

Vide ante, vol. iii., p. 448.

Bempde *v.* Johnstone, 3 Ves. Jun., p. 198.

The next case noticed, is that of Bempde *v.* Johnstone, &c., decided in the Court of Chancery 12th June 1796, in relation to the domicile of the Marquis of Annandale. The circumstances were: That the Marquis was born 1720, in his father's house in London. He continued there until he was sent to Eton, where he remained till 1734, except in the vacation, when he visited his mother in London. Leaving Eton he went abroad, and continued abroad, in different places, till 1738, when he returned to London, whence, in a few days he went to Scotland. He continued there little more than a month, returned to England, remained there about two months, and then went abroad. He continued abroad in different places, till December 1739, when he returned to England, and he remained in London till April 1740. Then he went to Scotland and returned to England in October, and so on until December 1743, when he went abroad. In the middle of April 1744, he returned to England and remained there until his death. During his life a commission of lunacy had been issued against him in 1747, and he was found to have been a lunatic from 1744.

The Lord Chancellor, upon these facts said, "That as to "his residence in Scotland, he never was there at any period "with a fixed purpose of remaining. His existence was "purely a purpose of either visit or business, and both cir-"cumscribed and defined in their time. Wherever he had a "place of residence that could not be referred to an occa-"sional and temporary purpose, *that* is found in England, "and no where else. I am not clear that the period of his "lunacy is totally to be discarded; but I will take him to "have died then. For the greater part of the period pre-

" vious to that he was fixed in this country, and fixed by all " those ties that describe a settled residence and distinguish " it from that which is temporal and occasional."

And so in the case of Lord Sommerville's domicile. The late Lord Sommerville was born in Scotland on 22d June 1727. He remained there till the age of nine or ten, in the course of which period he was at school at Dalkeith and Edinburgh. At that age he was sent to England to school for some time. Afterwards, in June 1742, he was sent to the Westminster school there for sometime, and thence to Caen, in Normandy, for the purpose of education, where he resided till the age of eighteen. Upon the breaking out of the rebellion in Scotland in 1745, he was sent for by his father, joined the royal army as a volunteer, and continued in the army until 1763. He then went to Scotland. Then went abroad, and, in 1765, on account of his father's illness and death, returned to Scotland, where he remained about six months. In 1779, he took a lease, for twenty years, of a house in Henrietta Street, Cavendish Square, London. He continued to occupy this house until his death, visiting Scotland in the summer, and staying, when there, at " Sommerville House." About ten years before his death, he was elected one of the sixteen peers, to represent Scotland in the House of Peers, and attended his Parliamentary duties every winter. In Scotland, Lord Sommerville's establishment and style of living were suitable to his rank and fortune. In London, he had only one or two female servants, and but two men servants from Scotland. In these circumstances, it was held that Lord Sommerville's domicile was that of Scotland. Thus showing, that it is the preponderance of incidents in a man's life, which goes to constitute his domicile.

2d, It is next to be considered whether any or what effect can be given to the ceremony of marriage, performed by the late Earl and Mary Millner, in England, on the 2d July 1820, when his Lordship was *in articulo mortis*, and, in particular, whether it can avail John Bowes, the son of Mary Millner, so as to make him a lawful heir and legitimate, in virtue of the Scottish law of legitimation *per subsequens matrimonium*.

In treating this point, it is scarcely necessary to mention, that legitimation, *per subsequens matrimonium*, though it prevails in Scotland, and several other countries in Europe, is altogether disowned by the law of England. But, though a different rule prevails in Scotland, even there that rule has

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been restricted in its operation; and legitimation of a child *per subsequens matrimonium*, confined entirely to cases where the parents were domiciled in Scotland. The same principle obtains in regard to the constitution of marriage itself, for in Lord Hardwicke's time it was decided on appeal from Scotland, in the case of M'Culloch *v.* M'Culloch, that cohabitation as man and wife, in a foreign country, would not have the effect of establishing a valid marriage by cohabitation, because the cohabitation, in order to have that effect, must be a cohabitation in Scotland, where that law prevails.

Vide ante, vol. ii., p. 33.

The case of Shedden was next referred to, to show that subsequent marriage of the parents, in a foreign country, will not legitimate the child previously born, to the effect of succeeding to heritable estate in Scotland.

Vide ante, vol. v., p. 194.

The principle of that decision was recognised by the Lord Chancellor (Eldon), in the late case of Gordon *v.* Gordon. In that case, the father of the parties, by birth a Scotchman, went as an engineer in the service, to America in 1754, and there formed a connection with an American female. In 1759, a son was born, and in 1761, another son, the plaintiff in the cause. In 1763, he purchased an estate in Pennsylvania, and in that year he married the mother, and after that marriage the defendant was born. The father died in 1787, and the eldest son died in the same year. There were also estates in the island of Granada. In 1790, an agreement was come to between the plaintiff and defendant, by which the latter agreed to relinquish his right as heir-at-law of his father, and upon that agreement the suit arose, the plaintiff having afterwards filed his bill to set it aside, on the ground of an alleged private marriage before the birth of the first son. Lord Eldon introduced his judgment in the following words:—"This is a very important case, and if I understand "it, it is thus represented. Many years ago, the plaintiff "and defendant in this suit, both of them the sons of the same "lady and gentleman, understood themselves in this sort of "situation to that lady and gentleman, namely, that the "plaintiff was the illegitimate son of those two persons, and that "the defendant was the legitimate son of those same persons. "They were Scottish people originally; but the marriage "having been in America, that marriage, by a decision in "the House of Lords, would not give legitimacy to children "that were born before marriage, whatever might have been "the case of Scotch people married in Scotland. So, under-"standing themselves as being related to their father and

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"mother, they accordingly came to an agreement with respect "to the enjoyment of their property."

The application of these cases to the present, must be instantaneously manifest, and it is equally obvious that it must prove decisive of this question.

It may be embraced in a syllogism, thus:—The parents' real or supposed, of John Bowes, the opposing party, were domiciled in England, and their marriage was celebrated there in 1820, the offspring having been antecedently born in 1811, in the same country. The question as to the *status* or legitimacy of John Bowes is, therefore, to be judged of by the law of England, where the parents were domiciled, and their marriage took place. The law of England admits not of legitimation of issue, *per subsequens matrimonium*, and therefore, John Bowes, born and domiciled also in England, can make no claim to a *status*, or to the character of legitimacy, which depends upon a law not recognised in the country of his own domicile, and where, in fact, no such law exists.

3d, Besides here, as the marriage founded on in this case was one entered into and celebrated in England, the marriage-contract was English, and must be judged of in all its relations and consequences, according to the *lex loci contractus*.

4th, Finally, there is still another point which goes, perhaps, more deeply into the state of some of the parties interested, than any of those which have been treated; for it ought to be considered, whether the late Earl of Strathmore in reality contracted any marriage at all with Mary Millner, the mother of John Bowes, the opposing party. Consent is the essentials of the contract, and it must be a marriage with a special reference to *consortium vitæ* not *concubitus*. The Earl, at the time of his marriage, being *in articulo mortis*, was utterly incapable of either *concubitus* or of fulfilling the duties which attach to the *consortium vitæ*. This absolute disqualification, on the Earl's part, must nullify the contract at once.

After hearing counsel,

LORD CHANCELLOR (ELDON) said:—

"My Lords,

"Your Lordships at length are called to the duty of expressing your opinion upon this case. Very early after the death of the Earl of Strathmore, who sustained the characters both of a British Peer, and of that which, in the discussion before your Lordships, has been called a Scotch Peer, questions arose which rendered it my duty to suggest that it was desirable that this case should be

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presented to your Lordships for decision, at as early a period as possible. The testator died seized of very considerable property in England; he made a will and different codicils, which are in evidence before your Lordships, by which he devised certain real estates to his son or his reputed son, the petitioner, whose case has been heard at your Lordships' bar. Suits were instituted, or a suit was instituted in the Court of Chancery, in which, on his part, he was represented as Earl of Strathmore. Mr Bowes, the brother of the late Earl of Strathmore, the reputed father of the present infant, also presented himself upon the record as Earl of Strathmore; and a difficulty therefore arose in what manner the judge of the Court, in which I have the honour to preside, was to deal with these parties. In point of process, both of them could not be Earl of Strathmore, and I could not, therefore, consistently continue the process directed to either of them as Earl of Strathmore; and taking care that that act should not prejudice the interests of the Peer, if the present infant is the Peer, there arose out of the will of the late Lord, another question, which called for decision, namely, what was to be done with respect to guardianship? For the late Lord appointed a guardian, stating him to be his reputed son, and though we are in the habit of taking the representation of a reputed father, such a father cannot, according to our law, appoint guardians. It was necessary, therefore, for me to determine whether he was legitimate or illegitimate; if he was legitimate, the appointment of a guardian was a legal appointment; if he was illegitimate, it would be taken only as a recommendation to the Court of that which, if he had been legitimate, the testator would have recommended. My Lords, if this question had turned merely on questions usually arising in that Court, I should have taken on myself to decide them; but the right of the Peerage being in question, it did appear to me fit to suggest the necessity of applying to a tribunal within whose jurisdiction the determination of such right constitutionally falls; and this induced the application of those arguments, which I think I may take the liberty to represent, with the concurrence of all your Lordships, have on all sides very much distinguished the character, talents, and abilities of the counsel who had urged them.

"My Lords, if I had no reason from what had been decided in a case of this nature, recollecting what passed in this House in the case of Shedden *v.* Patrick, I might have ventured to say, that under the circumstances of this case, this child could not be legitimate. My Lords, I still retain that opinion, notwithstanding all I have heard at the bar, and I wish only, for my own sake, to take care that it may not be supposed I have given an opinion on points on which it is not necessary to say anything. The illegitimacy of this child appears to me to be made out by the circumstances which I shall shortly state, I mean the birth of

his father in England; the fact that his father was not, as his ancestors were (provided he was legitimate, I should call them his ancestors), a mere Scotch Peer, but that he was, as Earl of Strathmore, British; that he was Baron Bowes, a British Peer; that the mother was an English woman. I do not recollect that she had ever been in Scotland at all; if she had ever been in Scotland at all, it escaped my recollection; that the marriage was in England; that the domicile of Baron Bowes was principally in England; that her domicile was certainly altogether in England; and, under the circumstances, it does appear to me, attending to the principle which the House meant to maintain in Shedden *v.* Patrick, that, without deciding at all what would be the consequences of a person married in Scotland before the Union, or persons married in Scotland since the Union, or persons removed from Scotland, domiciled elsewhere, and going to Scotland and obtaining a domicile and marrying in Scotland; without determining those points at all, but recollecting the state and condition of these parties, and the fact that the father was a British Peer, and looking to the effect of the Act of Union, I am bound to tender to your Lordships my humble opinion, I am sorry so to state, but it is my duty so to state, that this child is not a legitimate child. The consequence of that opinion will be, if your Lordships adopt it, that he cannot make out his title. I do not entertain any doubts upon the grounds of the decision in this case. If any of your Lordships should entertain doubts upon this subject we must regularly go into a discussion of the merits of this case; but unless your Lordships do entertain doubts upon the subject, I think it sufficient, after the full discussion your Lordships have heard, to say that that is my opinion."

Lord Redesdale.—My Lords, in stating what occurs to me upon this case, I will trouble your Lordships with very few words. My Lords, I think it is necessary to consider the effects the Articles of Union, and the subsequent Acts of Parliament referring to the Realms of England and Scotland, at one time distinct, have had upon this question. My Lords, by the Articles of Union, that distinct Peerage of England and Scotland ceased to exist; there was no such realm as the Realm of Scotland or the Realm of England, there was thenceforward only the Kingdom and the Realm of Great Britain; and all persons who were within the two distinct kingdoms before the Union of England and Scotland, and the subjects of these two distinct kingdoms became henceforth the subjects of the new Kingdom of Great Britain. My Lords, by the Articles of Union, the persons who were before Peers of the Realm of Scotland, became Peers of the Realm of Great Britain, by the express words of one of the Articles of Union—the 23d Article. My Lords, there is an express distinction between the character of Peer of the Realm, and Lord of

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Parliament. A Lord of Parliament has a distinct character. A Peer of the Realm is one thing, a Lord of Parliament is another thing. Your Lordships know, that those who are frequently called Spiritual Lords are not Peers too, but are simple Lords of Parliament; and so the sixteen elected Peers of Scotland, as elected Peers, are Lords of Parliament, though capable of being so elected only in consequence of their being Peers of the Realm of Great Britain, having been, previously to the Union, Peers of Scotland.

"My Lords, when they became, by the Act of Union, Peers of Great Britain, they claimed a right of inheritance in a dignity appropriated to Scotland, but a dignity in the Realm of Great Britain, namely, the dignity of a Peer of Great Britain; they acquired a new right hereditary throughout the country, and they lost the character, except for the purpose of the election of Peers of the Realm of Scotland, which for all other purposes, then ceased to exist. My Lords, as Peers of the Realm of Great Britain, they must be subject to the laws of Great Britain, and not to the peculiar laws of a particular district; for thenceforth England was not one district and Scotland another district, locally governed by their own particular laws, but both of them subject, for all general purposes, to the general laws of the United Kingdom. If your Lordships will look at the Act of Union, you will perceive that nothing is stipulated with respect to the continuance of the laws of England; but, it is evident, and it has always been conceived, that the law of England was thenceforth to be deemed the general law of the Realm of Great Britain—the new created Realm of Great Britain—except as qualified by the particular provision, with respect to the laws of Scotland, contained in the 23d Article of the Union.

"My Lords, the consequence seems to me, that the rights of the Peers of the Kingdom of England before the Union, must be considered as the rights of all the persons who, by the Act of Union, were constituted Peers of Great Britain after the Union, so far as they were to be considered Lords of Parliament; that general right being qualified in respect of those persons who, previous to the Union, were Peers of the Realm of Scotland, because, with respect to them, the character of Lords of Parliament was given only to the sixteen Peers elected out of the general body.

"By the Articles of Union, and by the Acts of the two Parliaments of England and Scotland, which confirmed the Union, all the laws of England or Scotland, inconsistent with the Articles of Union, were repealed; and, consequently, no law in Scotland, no law of England, inconsistent with the Articles of Union, had henceforth any force. If, therefore, the law of Scotland taken by itself, and before the Union, could affect the character of a Peer born or domiciled in Scotland, but who had become, by the Articles of Union, a Peer of Great Britain, I do apprehend that

law could have no effect upon his character as a Peer of Great Britain. My Lords, if, therefore, the right of the Peers of the Realm of England were, upon the Union, communicated in this manner, by amalgamating in one body, as one may say, the Peers of Scotland and the Peers of England, as existing before the Union, and making the two Peers of one realm, namely, the Realm of Great Britain; and if, as I think, it is evident from the whole frame and texture of the Articles of Union, the laws of England were those which were to attach to the United Kingdom, except as they were qualified by particular provisions respecting Scotland, the consequence would be that any law of Scotland differing from the law of England prior to the Union, respecting particular succession to the dignity of a Peer of Great Britain, must be inconsistent with the Articles of Union; and, consequently, the Peers of the former Realm of Scotland, would become Peers of England, and the laws which made them particularly Peers of Scotland, would be held to be repealed.

"My Lords, with respect to the particular question now before your Lordships, the infant who claims, as son of the Earl of Strathmore, the dignity of Earl of Strathmore, now a dignity of the peerage of your Lordships, united in the kingdom of Great Britain and Ireland—for that is the effect of the subsequent Union with Ireland—stood in this situation. He was born in England, born of a British mother, and of a father, of whom I must say, in conformity to what has been decided, particularly in the Marquis of Annandale's case, a father domiciled in England. My Lords, with reference to the fact of his being one of those persons who, for certain purposes, are called Scotch Peers (but only for certain purposes so called, being all now Peers of Great Britain), if that course could operate to make any change, consider what would be the effect of it. The Duke of Richmond is Duke of Lennox; is the Duke of Richmond, therefore, to be considered a Scotchman on that account, distinct from his character arising from his domicile and his residence in England? A noble Lord (Verulam), whom I see, is a Peer also of the Kingdom of Scotland, for the purpose of electing one of the sixteen peers, I do not know what his situation may be with respect to Scotland, but, I believe, he would be very much surprised if he was to be considered in any respect as a domiciled Scotchman. There are other noble Lords who are certainly in a similar situation; I, therefore, take it that the circumstance of his being one of those persons who, for certain purposes, are still called Peers of Scotland, though really Peers of Great Britain, which is the only realm existing after the Union, in the reign of Queen Anne, and now joined and united with the kingdom of Ireland, that character cannot possibly affect the question, Whether he was or was not domiciled in England? His birth was in England—his residence was in England, and he

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must be taken to be, to all intents and purposes, a person domiciled in that district of the United Kingdom, which is called England. I apprehend, that if my Lord Strathmore had died intestate, his personal property would have been distributed according to the local law of England, the law of that part of the country; for he certainly was much more to be considered a person domiciled in England than the late Marquis of Annandale was, whose residence in England was under very particular circumstances. My Lords, the child that was born of Lady Strathmore, as she now is, and whom my Lord Strathmore acknowledges to be his child, was unquestionably born under circumstances which constituted him a person born out of lawful marriage. He was born in England of an Englishwoman, who never had been before in Scotland, and, I understand, never since was in Scotland; the law, therefore, that attached to him upon his birth, was the law of England; and if his mother or his supposed father had died within a few years after, unquestionably he was an illegitimate child, born in England, subject only to the law of England, and having no character whatever, but that which had been derived from his mother. But, it is said, that the subsequent marriage of his father shall have the effect, on account of the connection which that father had with the district of Scotland, of making him the legitimate heir of the dignity of Earl of Strathmore; though, my Lords, if it is to have that effect, it must have the effect of controlling the law of England, it must repeal the law of England for so much; and, I apprehend, that you cannot construe the provisions in the Articles of Union to have any such effect; you cannot construe the provisions in the Articles of Union, with respect to the law of Scotland, to extend beyond the local district of Scotland, upon whom, at his birth, the law of England attached, who was a natural-born subject of the realm, only because he was born in England, and who, in that character, was liable in all the consequences arising from the illegitimacy of his birth in England, because his father possessed a peerage, which is still called, for certain purposes, a Peerage of Scotland, and that, therefore, his state is to be governed by the law of Scotland. I do conceive, that that would be in effect to repeal the law of England, and that there is nothing whatever in the Act of Union, which can possibly give such effect to Scotch law. My Lords, I think the case which has been mentioned as decided in France, is strongly in point upon that subject; for, on what ground was that French case decided? The ground on which it was decided, was this, that the child was born in France —born there, subject to the laws of France, and that the retrospective effect was consistent with the laws of France—that he had gained, at the instant of his birth, the capacity of a child born in France; whereas this child, at his birth, had no such capacity

in reference to Scotland, he was born in a country where, according to the law of that country, he was incapable of being a legitimate child. It seems to me, therefore, that if your Lordships were to hold this subsequent marriage of the Earl of Strathmore with the mother of his child, to have the effect of legitimating the child, the consequence would be, you would abrogate the law of England, in so far as that is certainly not within the meaning of the Articles of Union. My Lords, I do not enter into the question whether, if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because, I think, it not necessary; but I must say that I cannot conceive how it could have that effect. In the case of Sheddan *v.* Patrick, it was determined, that a child illegitimate in the United States of America, was not capable of inheriting in Scotland. It has been stated that that was decided on the ground, that he was born an alien. Why was he born an alien? Because the law of America touched him at his birth, and the restrospective effect of the law of Scotland could not alter that character which, at its birth, attached upon him. My Lords, I apprehend, that this is the true ground of the decision—he was an alien, and that character could not be altered by the retrospective effect of the law of Scotland; so I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother, of whom he was born, and, according to the state of his father, who was, at the time, a person unquestionably domiciled in England. My Lords, if we were to enter into the consideration of the effect of a subsequent marriage, because it was solemnized in this country, I am afraid we must go a great deal further than I think it necessary to go in this case. The law of Scotland admits an acknowledgment of marriage as equivalent to the actual form of marriage—the ceremony of marriage is not necessary for the purpose, according to the law of Scotland; but, I apprehend, it never can be allowed that that sort of acknowledgment, except in Scotland, could have that effect. I presume that, unless that acknowledgment was in Scotland, it could not be deemed to have the effect of legitimating a child not born in Scotland, so that, under these circumstances, he could, by the law of the country in which he was born, become a legitimate subject. The acknowledgment of a marriage, we are told, would, in Scotland, have a legitimating effect: when or where that marriage was solemnized, in a case of mere acknowledgment, need not be declared; it is sufficient, by the law of Scotland, simply to declare that this person, describing her, is the wife of the person who makes that acknowledgment, and that has the effect of giving to the wife and to the supposed issue, the legal character of a wife and legitimate child, by the retrospective effect which that marriage had. My Lords, I forbear to enter further into that part of

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the case, because I think it would carry your Lordships much further than it would be necessary to go; and I have not observed that, in the arguments at the bar, that has been at all considered. My Lords, upon the whole, I do conceive the subject that is now in question, is an inheritance governed by the law of the United Kingdom, and that the person who is to claim that inheritance, must, according to that law, be heir of the person from whom he claims it by descent; that, according to the law of England, taken independently of the law of Scotland, it is impossible that it could be claimed by a person who now appears before your Lordships; that if the law of Scotland was to be admitted to have the operation which, in this particular case, to which I would wish to confine myself, it is alleged it ought to have, it would operate as a repeal of the law of England—it would be repugnant to the law of England, and, therefore, is inconsistent with the Articles of Union. Upon that ground I am of opinion that the claimant has no right to the dignity of Earl of Strathmore, and, consequently, that the dignity does properly belong to Mr Thomas Bowes, the brother of the late Earl of Strathmore."

LORD CHANCELLOR.—"I wish it to be distinctly understood that I do not mean to intimate any opinion to your Lordships, what might have been the law as applicable to this case, if those parties had been married in Scotland. That this case is open to inquiry, investigation, and decision, whenever it arises; and I take leave to make that addition to what I have before said, because I do apprehend that the succession of Scotch Peers, by which I mean Peers domiciled in Scotland, and, *ipso facto*, Scotchmen are to be regulated by the Scotch law.

It was resolved and adjudged that the petitioner, John Bowes, is not entitled to the titles, honours, and dignities of the Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, Tannadyce, Ledlaw, and Strathdightie, claimed by the said petitioner.

Resolved and adjudged, that the petitioner, the Right Hon. Thomas Bowes, hath made out his claim to the titles, honours, and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, Tannadyce, Ledlaw, and Strathdightie, claimed by the said petitioner.

Resolved and adjudged, that the petitioner, John Bowes, is not entitled to the title, honour, and dignity of Baron Bowes, claimed by the said petitioner.

For John Bowes, *Chas. Wetherell, Geo. Cranstoun, John Fullerton, Jas. Abercromby, W. G. Adam.*

For the Hon. Thomas Bowes, *Anthony Hart, R. H. Blossett, L. Shadwell, R. Hamilton.*

SUPPLEMENT

TO

CASES ON APPEAL FROM SCOTLAND.

[THE Compiler, on going over the omitted cases, doubted whether those now given as a Supplement might not be deemed of sufficient importance. Distrusting his own judgment in the matter, he has thought it best to make the selection now given, leaving it to the profession to consider whether he has done right or not. He has, also, recovered the Lord Chancellor's speeches in a few cases, already reported by him, which are given at the end.]

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BROWN, &c. v. CHALMERS, &c.

DAVID BROWN, Moderator of the Synod of Aberdeen, and Others, ... *Appellants;*

Mr GEORGE CHALMERS, Principal of the Old College of Old Aberdeen, and Others, . *Respondents.*

House of Lords, 14th March 1734.

CHARTER—FOUNDATION—TRUST USES—ELECTION OF PROFESSOR.—Held, that the appellants having deviated from the directions contained in the Charter of Foundation, as to the election of a Professor of Divinity in King's College, Aberdeen, the election was void and null.

In the year 1641, the Provincial Synod of Aberdeen, by a voluntary contribution, raised the sum of 10,000 pounds Scots, and laid the same out in the purchase of lands from Forbes of Craigivar, the rents and profits whereof were destined for the support of a Professor of Divinity in the College of Old Aberdeen.

By this settlement (which was completed by charter and sasine), the lands purchased were granted to John Forbes, then Professor, and his successors in office; and rules were

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given for electing the Professor of Divinity upon vacancies of any kind, and for disposing of the rents and profits during such vacancy. In this grant, and in this charter from the Crown, that followed thereon, anno 1642, the rules of election were contained, namely, "That the Professor is to be "elected of the most qualified, without respect to birth, place "of residence, or place education,—that the holding that "office is to be inconsistent with the holding of any other "office in the church or kingdom,—that, therefore, upon the "Professor's obtaining any other benefice, or office, the pro- "fessorship is to become vacant. That the triers, electors, "and admitters (examinatores, electores, et admissores), of "the said Professor, in all time coming, shall be the Modera- "tor of the Synod of Aberdeen: Two commissioners, dele- "gated from every presbytery in that Synod, to be chosen "by the several presbyteries for that end; the Principal of "the College, with another delegate from the College, and "the Dean of Faculty of Theology, or some other person of "that faculty, to be chosen by election, making in all twenty "persons. *That immediately after any vacancy the Moderator* "*of the Synod shall convocate* and *meet* with the *other electors* "within twenty days after such vacancy happens, within the "College Church of Old Aberdeen, in order to issue proper "intimations for the election. That upon the *Moderator* of "*the Synod's failing* to *convocate* and assemble as aforesaid, "the *Moderator of the Presbytery of Aberdeen*, and upon his "failure, the *Dean of Faculty* shall, within other twenty days, "convocate and meet with the other electors, and shall issue "programmes of advertisements, to be published in the places "in Scotland most famed for literature, to the end proper "persons may have notice, and may offer themselves to a "trial (on certain heads expressed in the charter). That the "office shall be conferred upon the person who, on trial, shall "be found to be the worthiest and best deserving. The "place of election to be in the College Church of Old Aber- "deen. And the profits during any vacancy are to be up- "lifted by the Minister of Old Aberdeen, and the Moderator "of the Presbytery, to be accounted for by them to the Pro- "vincial Synod; to be applied by the approbation of said "Synod for some pious use; and the deeds and evidents are "ordained to remain in the charter chest of the University of "Aberdeen."

Mr David Anderson, the last Professor of Divinity, having misapplied some money appropriated to the support of this

professorship, the Synod of Aberdeen, pursuant to certain powers reserved to them in the original settlement, in October 1726, made the following act and resolution, viz., "That "upon the next vacancy, the stock should be replaced out of "the vacant rents, which, by the charter, are provided to be "at the disposal of the Synod," and, therefore, they resolved to suspend the supplying a vacancy until the sum was made up.

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On the 13th February 1732, the Chair of Divinity became vacant, by the death of Mr David Anderson.

The first meeting of the electors ought, according to the charter, to have been, on or before, the 5th of March following; but the Moderator of the Synod omitted to bring the electors together against that day, so that the right of convocation devolved on the *Moderator of the Presbytery.*

Nevertheless, the appellant, Mr Brown, Moderator of the Synod, with nine others of the twenty electors, thought fit to meet at Aberdeen (not in the College Church, the place of election), on the 21st of March, long after the period fixed for that meeting was over, and then, in place of issuing the proper intimations for inviting candidates, as the charter directs, they adjourned their meeting for election, first, to the 2d, and then to the 26th of April, when, having fixed on the other appellant, Mr Gordon, a member of their own Synod, as a fit man to fill the Professor's chair, they, without the concurrence of the other electors, who declined to give countenance to so unwarrantable proceedings, without issuing any programme to invite candidates, and without any trial or examination, thought fit to elect Mr Gordon Professor of Divinity, in King's College, Aberdeen.

The respondents thereupon brought a suspension and interdict (injunction). They also brought a reduction of the election; and the two actions having been conjoined, the Lord Ordinary reported the case to the whole Lords, and the Lords pronounced this interlocutor: "Finds, that the "clause in Craigivar's disposition, enabling the Synod to "make additions to the rules of the mortification, is to have "its effect, though not particularly mentioned in the charter; "but finds, that the Synod's act in the year 1726, suspend- "ing the supplying the vacancy until a sum was made up, "was beyond their power. And find, that the diet, ap- "pointed by the moderator of the Synod, for convening the "electors being beyond the twenty days, was not agreeable "to the charter; albeit the advertisements were within the "twenty days. Find this relevant to annul the election;

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"and also *separatim*, find that the election being made without issuing a programme, and a comparative trial is relevant to reduce the same." On reclaiming petition the Court adhered.

Against those interlocutors the present appeal was brought.

Pleaded for the Appellants.—That the omission to assemble within twenty days was inconsiderable. It was occasioned by the moderator of the Synod, not knowing the precise tenor of the charter, which was in the respondent, Mr Chalmers' hands. Though the delegates from the several Presbyteries did not meet till after the lapse of twenty days, yet the moderator sent his summons to acquaint them of the day of meeting before the expiration of that period; and, therefore, since he did what he could to assemble the electors in due time, their act ought to be sustained. 2d, Though the charter seems to require a notification by programme, to all learned men, and an invitation to stand candidates at a public trial, where the most deserving, upon examination, is to be preferred, yet *de praxi* this method has been disused for many years, as having been found unprofitable, because men of worth and character would not willingly submit themselves to comparative trial and to public disputation, which is the reason why the act of the commission for visitation of colleges and schools aforesaid, anno 1690, did not extend the directions therein given to Professors of Divinity. This Act, which the Court held not to affect the question, declares that Professors of Divinity are not to undergo any comparative trial at the admission, and therefore their omitting to comply with the rule established by the charter, was justified.

Pleaded for the Respondents.—1st, The moderator of the Synod either did or ought to have known the precise directions of the charter, a copy whereof is constantly kept with the Synod's books, for his guidance. The respondent, Mr Chalmers, had the original charter, only as he was Principal of the College where it was deposited, and to this the moderator might have had access. Whatever might be said as to the validity of the appellants' act, after the lapse of the first twenty days, without meeting, if the charter had made no subsidiary provision, yet as *de facto*, the charter provides that upon failure of the first meeting to be called by the moderator of the Synod, the moderator of the presbytery shall act; and, upon his failure, the Dean of Faculty shall proceed within the space of twenty days more, there is a clear determination of the moderator of the Synod's right to assemble

the electors after a neglect of twenty days; and that devolves upon other persons who must execute it.

2d. Neglect to comply with the directions of the foundation charter, in instances where such omission is not objected to, cannot invalidate these directions, but the electors, whose power flows from that charter, must be ever bound by the conditions thereof.

It is not by the charter necessary, that there should be any public disputation or comparative trial, such as by the act of the commissioners of visitation, *anno* 1690, seems to be required in the case of *masters and regents;* but, it is required that programmes be published, and that notice be given in all the places of Scotland most famed for literature, to the end that proper persons may offer themselves as candidates, and that *trial* be taken of their *qualifications*. Now, as trial may be taken without public disputation, and, as upon notice given, men of worth and learning might be found willing to offer themselves as candidates for a divinity chair, though the appellants had had power, as they had done, to supersede the directions of the foundation charter; it would have been a very improper exercise of that power, to stifle the notice intended by the charter to be given to all learned men, to foreclose themselves thereby from all comparison upon trial, and to fix, without any invitation of learned men to be candidates, or any examination, upon the minister of a country parish, to fill a Professor of Divinity's Chair in a public University.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed, with £50 costs.

For the Appellants, *A. Hume Campbell, R. Dundas.*

For the Respondents, *Dun. Forbes, Wm. Hamilton.*

Mr ARCHIBALD MURRAY, *et al.*, Trustees for the Creditors of JOHN LOWIS of Merchistoun, ... } *Appellants;*

The Honourable FRANCIS CHARTERIS and his Guardians, ... *Respondents.*

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House of Lords, 3d April 1734.

MURRAY, &c. v. CHARTERIS, &c.

BANKRUPTCY—ACT 1696—HERITABLE BONDS—INFEFTMENTS—USURY—ONEROUS CAUSES.—(1) Heritable bonds granted long before the bankruptcy, but no infeftments taken upon them until within sixty days thereof, held ineffectual, reserving objection to the bonds otherwise. (2) Objection was stated to the bonds otherwise on the grounds of usury, and that they were not granted for onerous causes. Held usury not relevant; but held the bonds sufficient to instruct their onerous causes. In the House of Lords affirmed as to usury, but reversed *quoad ultra*, and held the bonds did not instruct their onerous causes without some farther proof thereof.

John Lowis, Esq. of Merchistoun, was apparent heir, and succeeded to a very opulent estate, real and personal; but soon after being possessed thereof, his affairs fell into disorder, and he became bankrupt. Thomas Menzies of Lethem and William Scott Blair of Blair, having been engaged along with him in several transactions, became bankrupt also.

It was agreed between the creditors and the bankrupts, that the bankrupts should convey and make over all their estates real and personal, to the appellants, as trustees for the whole creditors, towards payment of their debts, which was done accordingly.

Amongst the creditors was Colonel Francis Charteris, now deceased, who appeared and claimed as a creditor of Mr Lowis, by two *heritable bonds*, one for £3745, 4s. 4d., and the other for £1000, upon which bonds he had taken no infeftment for many years, till the bankruptcy came to be discovered; but then, the appellants alleged, the infeftments were taken with the view of establishing in him a preference for his debts, in prejudice of all the other creditors, whose debts were secured by personal bonds only.

The claim lodged, amounted, principal and interest, to the sum of £6000, which made it necessary for the appellants to investigate the grounds of it. Upon doing which, they found that Mr Lowis never borrowed or received one shilling from Colonel Charteris,—that the foundation and origin of the whole claim was, the misfortune of losing about £200 at gaming, for which he gave his note or bill, which came into the hands of Mr Charteris, and that Mr Lowis, fearing the consequence of having the matter discovered to his father, was induced to grant new bills, notes, bonds, &c., for such money forbearance, &c., till, by frequent renewal of securities,

with accumulations, and usurious exactions, the Colonel obtained the two heritable bonds in question.

The appellants brought an action against the Colonel to have these bonds and securities set aside and declared void, as being obtained by imposition, and without valuable consideration.

The appellants also superadded another action, founded on the statute of 12th Queen Anne, against usury.

Separately, it was contended by the appellants under the Act concerning notour bankrupts, "That all bonds upon "which infeftment may follow, granted by the said bankrupt, "should only be reckoned as to this case of bankruptcy, to be "of the date of the sasine lawfully taken thereon." And, that in virtue of this Act, the Colonel's infeftments were void, because his heritable securities must be considered as of the date of the sasines, and these having been taken within sixty days of bankruptcy, were consequently void, and therefore he could have no preference in virtue thereof. Further, that the bonds were granted in security of prior debts.

The Lord Ordinary, after condescendence and production of documents, pronounced an interlocutor, finding "That Feb. 10, 1731.
"both the said bonds bearing date so many years before Mr "Lowis' bankruptcy fell under the Act 1696, in regard the "infeftments were not taken till within sixty days of Mr "Lowis becoming bankrupt, reserving to the creditors to be "heard how far the bonds were reducible otherwise, and that "they were usurious and illegal."

On reclaiming petition the Court adhered. June 19, 1731.

On a further production of documents with a reclaiming petition, the Court found that some of the old bonds for which the heritable bonds had been replaced, were granted for onerous causes, and that two heritable bonds were merely corroborative securities, and consequently to the extent of the said sums, fell under the description of the said Act 1696.

The cause coming before the Lord Ordinary, his Lordship reduced the two infeftments, and decerned, reserving to the appellants any objections to the bonds themselves on which these infeftments followed.*

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* The grounds on which the Court went in this part of the case which was not appealed, were, "That an heritable bond for money borrowed, granted long before the bankruptcy, if infeftment is not taken till after, or within sixty days of the bankruptcy, falls under the Act 1696."—*Vide* Elchies, vol. i, "Bankrupt" No. 5.

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Thereafter the appellants insisted in their second action on the ground of usury, and sought to have these bonds set aside on that ground, because more than 5 per cent. had been charged and taken, and that usury was exacted and taken by the Colonel, by his charging and receiving double interest for several years, upon £500, under cover of double securities, and that, therefore, his bonds should be declared void. They also alleged, that the bonds were not onerous, and that they did not instruct their onerous causes.

The Colonel having died, the action was revived against the respondent, Mr Charteris.

The Lord Ordinary reported the case to the Court, and
Nov. 15, 1732. the Court, of this date, found "the documents adduced for "instructing usury, not relevant, and find the bonds in ques- "tion sufficiently prove their onerous causes without the ne-
Jan. 11, 1733. "cessity of farther astriction." On reclaiming petition, the Court adhered to the first part of the interlocutor in reference to usury; but found "that the narratives of the bonds in "question did not sufficiently instruct the onerous causes of
Feb. 21, 1733. "the said bonds." The respondents reclaimed against the interlocutor, and the Court was pleased to alter the last interlocutor, and to adhere to their interlocutor of 15th November, finding "the bonds in question sufficiently prove their onerous
July 6, 1733. "causes, without the necessity of farther astriction."

The appellants reclaimed against this interlocutor, but the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the former part of the said interlocutor of the 15th November 1732, whereby the Lords of Session found the documents adduced for instructing usury not relevant, be, and the same are hereby affirmed; but that the latter part of the same interlocutor, finding the bonds in question, sufficiently prove their onerous causes, without the necessity of further astriction, be, and is hereby, reversed. And it is further ordered and adjudged, That the said interlocutor of the 11th January 1833, whereby the Lords of Session adhered to the first part of their former interlocutor, but found, that the narrative of the bonds

in question do not sufficiently astrict the onerous causes of the said bonds, be, and is hereby affirmed, with this addition, *videlicit*, "without some further proof thereof, "by circumstances or otherwise." And it is also ordered and adjudged, That the said interlocutor of 21st February 1733, whereby the Lords of Session adhered to their interlocutor of 15th November 1732, finding the bonds in question sufficiently prove their onerous causes, without the necessity of further astriction; and the said interlocutor of 6th July last, adhering to the said interlocutor of 21st February 1733, be, and are hereby, reversed.

For the Appellants, *Rob. Dundas, J. Strange, A. Hume Campbell.*

For the Respondents, *Dun. Forbes, W. Murray.*

[Fraser's Domestic Relations, Vol. i., p. 208.]

MARY DALRYMPLE (formerly GAINER), wife of Captain James Dalrymple, HELEN, ELIZABETH, MARY, and JEAN, their lawful Children, . . . } *Appellants;*

CAPTAIN JAMES DALRYMPLE, . *Respondent.*

House of Lords, 22d March 1741.

MARRIAGE—CONSTITUTION.—A declarator of marriage was raised by the appellant, on the ground that the appellant had been legally married to the respondent, at least, that by cohabitation as man and wife, and acknowledgment as such, she was entitled to that status, and his children to the status of lawful born children. Held, that she had not proved a lawful marriage, and that the cohabitation in this case was not relevant to infer marriage.

This was an action of declarator of marriage and legitimacy, raised by the appellant, Mary Dalrymple, against the respondent, on the ground that she was lawfully married to him at Kilkenny, Ireland, at least, on the ground of cohabitation as man and wife, and also, that the respondent had owned and acknowledged her as his lawful wife.

Her statement was, that the respondent, a Captain in the

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Earl of Rothes' regiment, then in Ireland, intermarried with her when she was scarce fifteen years of age, and from that time, 1724, they lived and cohabited together as husband and wife, in the most affectionate manner, and the appellant bore the respondent seven children, who were all baptized as his lawful children, and entered as such in the parish register of baptisms; four of them were held up by the respondent himself as sponsor, at the time of baptism, according to the custom of the Church of Scotland, and two of them, that died at Gibraltar, were buried in the church there, and entered in the register of burials, as the lawful children of the respondent, and the appellant, Mary, his wife.

The regiment to which the respondent belonged, being ordered to Gibraltar, the respondent went thither, and soon after his arrival wrote for the appellant to come to him, with her daughter, the appellant, Helen, their only child. She went accordingly to Gibraltar, and was received by the respondent with great affection, and carried by him to his house, where they openly lived and cohabited together as husband and wife, till 1736, being ten years. During all this time the appellant had the sole management and direction of the family, and he behaved to her, and she was treated on all occasions as his wife.

In 1736, the respondent obtained leave to go to Scotland, and having, together with the appellant (then pregnant), and their four children, embarked for England, they arrived in London. There they lived and cohabited together for some time, and were visited, and owned as such by the respondent's relations and acquaintances.

Some time afterwards, the respondent removed to Scotland, and during his absence there, she gave birth to another child, who was baptized as the lawful child of the respondent, his nephew standing as sponsor.

In April 1737, the respondent wrote for the appellant to come, with her children, to Scotland. She came to Scotland accordingly; but soon after their arrival in Leith, the respondent entirely withdrew from her all that support which he had formerly given, and withdrew also from her society, and attempted to entrap her into a disclaimer of her marriage.

The respondent's statement was, that having gone to Ireland to attend his duty with his regiment, he met Mary Gainer at a tavern in Dublin. She went with him to the barracks at Kingsale, where the regiment then was; and the

regiment afterwards removing to Kilkenny, she went there also, and there she was delivered of the appellant, Helen. She then went with him to Gibraltar in 1727, and from that time to 1736, the appellant only lived with him as his housekeeper, and had to him several children.

The appellant returned with him to England. He left her in London, and she followed him to Scotland. He then was obliged, upon seeing her taking upon her his name, and the character of lawful wife, to separate himself, offering, at sametime, to provide for her and her children, as his natural children.

The respondent married a lady of fortune, whereupon the appellant came to Scotland, and brought the present action of declarator.

After various procedure, in which a proof was allowed, and the appellant failed to obtemper, in some respects, the commission for proving allowed to her, which was renewed, the commissaries at last refused to renew it, and this having been brought before the Court of Session, their Lordships adhered. The commission issued was to prove the marriage or cohabitation in Ireland, and elsewhere, and the facts of acknowledgment. The Commissaries finally pronounced this interlocutor: March 6, 1740. "Having considered the proofs on both sides, find that the "facts and circumstances proved in behalf of the appellants, "were not relevant to infer marriage; and, therefore, absolved "the respondent simpliciter from their process, and ordered the "appellant, Mary, the mother, for the future to desist from "using the respondent's name, and giving herself out to be "his wife, reserving to the respondent to insist upon the "conclusion of his libelled summons at any time thereafter, "as accords."*

Against the interlocutors of the commissaries, as well as the interlocutors of the Court of Session, approving of the interlocutors of the commissaries, the present appeal was brought.

Pleaded for the Appellants.—1st, After twelve years open cohabitation, and the birth of seven children during that time, who were all offered in baptism by the respondent himself, or some of his nearest and most creditable relations, and all acknowledged by the respondent as his legitimate children, no Court ought to set aside such a marriage, and thereby bastardize the issue procreated between the parties, without giving each all the opportunities of making good their several

* This had reference to an action for defamation, raised by the respondent, at sametime, against the appellant.

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claims; the wife, of the lawfulness of her marriage, and the children of the legitimacy of their birth.

2d, That the commission for examining witnesses to prove the marriage, which was awarded on the 30th of May, was made returnable from the several places within England and Ireland, by the 17th September, and from Gibraltar and Portmahon by the 1st November following, within which time it was impossible, in common reason, to complete the proof, and it was therefore unreasonable to circumscribe the appellants in that respect, because many of their most material witnesses were then dispersed in several parts of the world. And, under such circumstances, it is the most cruel thing imaginable to declare a marriage null, after seventeen years, and to bastardize all the children born of it, because they are not able to finish, from foreign parts, the proof of the actual marriage of their parents, within the space of three months.

3d, Although there was an application made to the commissaries, for an interim aliment to the appellant, Mary, and a constant aliment to the other appellants, which both are by law entitled to, especially children, whom the respondent allows to be his, yet they never thought fit to take the least notice of so just a request.

Pleaded for the Respondent.—The appellant, though she pretended she was actually married to the respondent before they had any intercourse together, yet forgot the time or day of her marriage, for in her libel she did not fix the day of her marriage, nor the month, nor the year; nay, when she was directed by the Court to fix the day, she delayed several months doing it, and when she named a day, she named first March 1724, then August 1724, and at last the 27th of that month. But even this is not only not proved, but is contradicted by express facts; for, as the appellant insists she had no communication with the respondent till after her marriage, it is expressly proved she lived with him in the barracks at Kingsale, from whence the regiment went to Kilkenny in June 1724 (before the time of the pretended marriage), so that the appellant and respondent's cohabitation was, at least, twelve months before the time fixed for the pretended marriage.

Besides, the appellant pretends the first intimacy the respondent and she had together, was subsequent to her marriage, and that the appellant, Helen, her eldest daughter, was born in July after the marriage, that must be July 1725; now, it is proved the appellant, Helen, was born within six

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weeks after the regiment removed from Kingsale, which was in June 1724, and thereupon in July *Helen* must have been born.

The appellant, in her libel, says, that she was married by Mr Martin Archer, afterwards by a doctor of the surname of Martin. If the appellant could have proved her marriage, she might have done so under the commission allowed for that purpose.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby, affirmed.

For the Appellants, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Wm. Hamilton, Wm. Murray.*

[Fraser's Domestic Relations, Vol. i., p. 666.]

1742.

STEDMAN v. STEDMAN.

JANET STEDMAN, wife of James Stedman of Kinross, ... *Appellant;*

JAMES STEDMAN of Kinross, . . . *Respondent.*

House of Lords, 6th May 1742.

DIVORCE—REMISSIO INJURIÆ.—Though a husband, who raises an action of divorce against his wife, on the ground of adultery, does not withdraw himself from his house, where his wife chooses to remain, after the summons is served on her, but eats and sleeps separately, under the same roof, he is not held to cohabit with, or to be reconciled to her, so as to raise the plea of *remissio injuriæ* as a bar to the action; and, therefore, that plea was, in this case, repelled.

An action of divorce on the ground of adultery, was raised by the respondent against the appellant, his wife, setting forth that he had been recently informed, and had the greatest reason to believe, that his wife had for several years been guilty of, and had committed acts of adultery with Charles Coupar, sheriff-clerk of Kinross, who had regularly every Sunday morning, after he had gone to church, come to his house and had connection with his wife. It was also mentioned, that criminal familiarities with Mr Coupar were said to have taken place in the most public places.

Upon hearing this, the respondent stated that he thought

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it proper to withdraw from her bed; and soon after he instituted his action of divorce before the Commissaries of Edinburgh. The libel set forth the acts of adultery, at particular times and places. The appellant was served with the summons on 14th July 1741.

In defence the appellant appeared (on 2d August), and pleaded, That since she had been summoned, at least since the respondent had received the information that moved him to institute the suit, he had cohabited with the appellant, and entertained her in his house, which she insisted was a sufficient bar in law to the action, as it implied a reconciliation, or *remissio injuriæ*. It was answered for the respondent, That, though she still lived with him under the same roof, yet, they had separate beds, and that cohabitation only, or sleeping under the same roof, could not imply remission of the offence.

The respondent was allowed a proof of his libel, and the appellant liberty to prove her defence.

Aug. 19, 1741. On the representation against this interlocutor, she insisted, that the cohabitation itself, that is, living together in the same house, after the suit commenced, was a passing from the action; and that this was sufficient, without carnal conversation, and, therefore, desiring leave to bring proof of their cohabitation since citation; but the Commissaries adhered to their former interlocutor, and repelled the defence proponed.

Sept. 7, 1741. Afterwards the appellant presented a petition, offering to prove, That after the false information received by the respondent, of her alleged guilt, he was perfectly reconciled to her, owned and treated her in every respect as a wife, intrusted her with the management of his family; that they were frequently in private by themselves, both night and day; that he was in the room with her in private by themselves, while she was in naked bed, with the door shut upon them, and that after the summons was executed he was in naked bed with the appellant. Answers having been given to this petition, the Com-

Sept. 16, 1741. missaries pronounced this interlocutor: "In regard the defence "of reconciliation was laid so strong in the petition, as to ex- "clude the libel, they, before answer, allow the appellant to "prove her defence as laid; and allow the respondent a con- "junct probation; and supersede taking proof of the libel till "the proof of the defence was concluded."

The proof was accordingly taken. It seemed to amount to this, 1st, That the appellant and respondent lived in the

same house, and slept under the same roof, for sometime after the summons of divorce was served, though they did not eat together, but separately, and lay in different beds. 2d, That the respondent was sometimes seen to go into the appellant's room; and they were sometimes seen talking together in the shop and bedchamber, sometimes in friendly manner—sometimes not. 3d, That the appellant sold in the shop, which the respondent kept, sugar, for which she received the money. And one witness said, that going in once to the respondent's house, she saw the respondent sitting on the side of his bed, while she was in it. Two witnesses (servants) stated in evidence, facts and circumstances that led to the conclusion, that carnal connection had taken place. One had seen the "respondent lying above the appellant."

On the other hand it was alleged, that this testimony could not be relied on, and was contradicted by every other article of evidence, and the whole tenor of the proof as led. It was proved, in particular, at that very time, that the respondent and appellant were both in a very different frame of mind towards each other.

The commissaries thereafter found, "that the defence of "reconciliation was *not proved*, and therefore repelled the "said defence, and allowed the respondent to prove his libel, "and allowed the appellant a conjunct probation, as to all "facts and circumstances that may exculpate, and granted "diligence." Dec. 4, 1741.

The appellant brought an advocation to the Court of Session. The Lords, on the report of the Lord Ordinary, refused the bill. And on reclaiming petition the Court adhered, and remitted the cause to the commissaries. Jan. 5, 1742. Jan. 22, 1742.

The Commissaries ordered a proof of the libel, whereupon the appellant brought a second advocation; the Lords remitted again to the Commissaries to proceed with the proof in the action of divorce, and with instructions to supersede the appellant's proof of alleged subornation, till that proof was completed.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1st, As the charge upon the appellant was laid in so very general and uncertain a manner, that it was morally impossible any person could bring proof of facts, that inferred a negative of the charge; and as the appellant had full proof of some practices used to suborn witnesses against her, she could, without any admission of guilt, rely upon the legal defence of reconciliation or *remissio*

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injuriæ; and from her relying on that defence, it was not to be inferred that her innocence did not afford a sufficient defence, but that the contrivance of her enemies had rendered a defence, founded on her innocence, almost impracticable.

2d, The Commissaries and the Lords of Session ought to have found the *remissio injuriæ* sufficiently proved, as the evidence of the facts upon which it is founded would, in another case, have been sufficient to convict either of the married persons of a criminal conversation.

3d, The Court ought to have allowed the appellant to prove the practices used to suborn some persons to become witnesses in the cause.

Pleaded for the Respondent.—The plea of *remissio injuriæ* set up by the appellant at the very time the respondent was commencing and carrying on the suit, is in itself most improbable, unsupported by any credible proof, and inconsistent with what was proved by witnesses of undoubted veracity; and, from the manner in which it was first proposed, after the defence of cohabitation, though twice insisted upon, had been over-ruled, seems plainly to have been an after-thought of which the appellant was not apprised at the time she first appeared in this action.

2d, Her application to the Court for liberty to bring proof of several allegations, relative to the subornation and corrupting of witnesses, was only resorted to for the purpose of delay, and was in itself without foundation.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *Alex. Lockhart, W. Murray.*

For the Respondent, *Wm. Hamilton, C. Erskine.*

1743. WEIR v. NAISMITH, &c.

WM. WEIR, Esq. of Waygateshaw, . *Appellant;*

ARTHUR NAISMITH, JOHN SYME, CHARLES HAMILTON, WM CULLEN, JAS. HAMILTON, WILLIAM ALLAN, and Others, } *Respondents.*

House of Lords, 3d March 1743.

RIOT—DAMAGES—MAGISTRATES OF BURGH.—At a time of famine, when meal was scarce, a riot took place in the burgh of Hamil-

ton, whereby the appellant's granaries were broken into, and his meal carried off: Held the magistrates, William Cullen and Charles Hamilton, not liable to make good the damages, having not had any accession to, or connivance with, the rioters, but having done all in their power to prevent it: reversed in the House of Lords, and held them liable as having failed and neglected to perform their duty, and connived at the said riot. Also held William Allan and some others liable as having taken a part in the riot. *Quoad ultra* affirmed.

In 1740, at a time of a famine in Scotland, when meal was scarce and sold at a very high price, the appellant was suspected of keeping up his meal in order to obtain high prices for it; and the inhabitants of Hamilton, incensed by their privations, assembled in a riotous manner, and went in a body, with arms, horses, and carts, to the appellant's house, near Hamilton, broke open his granaries and storehouses, and carried off a large quantity of meal, to the extent of 101 bolls 15 pecks. Nov. 7, 1740.

The appellant, therefore, brought the present action of spulzie, oppression, and damages, before the Court of Session, against a number of persons named, who were active in the spulzie, as also against the respondents, Arthur Naismith, John Syme, William Cullen, and Charles Hamilton, magistrates and councillors of the said burgh.

William Cullen and Charles Hamilton were the magistrates of the burgh of Hamilton for the year 1740; and John Syme and Arthur Naismith were the former magistrates, and then councillors of the burgh.

It was stated, in his libel against the magistrates, that though apprized of the riot, they took no effectual means to quell the tumult, or to protect the pursuer's property; and it was further alleged, that they were the abettors of the violence committed, at least, that they connived at these unlawful proceedings.

The Court, after proof, pronounced an interlocutor, finding the whole parties concerned in the riot liable, and as to the respondents above named (the magistrates, &c.), "Find it not "proven, that Arthur Naismith, writer and late bailie in Hamil- "ton, John Syme, late bailie there, or William Allan, servant "to the said Arthur Naismith, also defenders libelled against, "were anyways accessary to, or concerned in raising or carry- "ing on the said riot or spulzie; but, on the contrary, find "it proven, that the said Arthur Naismith and John Syme "were noways accessary to, or concerned in the said tumult, Jan. 21, 1742.

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" but rather endeavoured to discourage the same; and that " their respective horses, and the carts of the said Arthur Nais- " mith were, by force and violence, carried off by the mob, to " the pursuer's house, and that William Allan, servant to the " said Arthur Naismith, though proven to have been present " with the said mob, yet, was necessarily there attending " his master's horses and carts, and, therefore, assoilzie the " said Arthur Naismith, John Syme, and William Allan, " simpliciter, from the whole articles of the libel. And also " find it not proven, that William Cullen and Charles Hamil- " ton, defenders, magistrates of Hamilton at the time fore- " said, had any accession to, or concern with the mob, but, " on the contrary, did all in their power to prevent the same, " and to discharge the duties of their office, so far as the " nature and circumstances of the case would admit, and " followed out the pursuer's own direction, with relation to " the management of the mob, and in doing what they could " to secure his meal, or the value thereof. And, therefore, " assoilzie them likewise from the libel."

Feb. 6, 1742. On reclaiming petition, the Court adhered.

Against these interlocutors the appellant brought the present appeal, contending, as to Naismith and Syme, that they must be considered as abettors of the violence, their horses, and carts, and servants being present; as to Cullen and Hamilton, that they had failed in their duty as magistrates, and for this neglect and failure in the performance of their duty, they ought to be held liable.

After hearing counsel,

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It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That so much of the said interlocutors as relates to William Cullen and Charles Hamilton, late magistrates of the town of Hamilton, and to the respondent, William Allan, be reversed; and that so much of the said interlocutors whereby it is found, " That the appellant is liable to the respondents, " Naismith and Syme, in their expenses," be also reversed; and it is hereby declared, That the said William Cullen and Charles Hamilton did not perform the duties of their respective offices, by endeavouring to prevent or suppress the riot and spulzie mentioned in the said appeal, but totally neglected the same, and connived at the said riot and spulzie: and it is, therefore, further

ordered and adjudged, that the said William Cullen and Charles Hamilton are conjunctly and severally liable to the appellant in the present action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st January, and also in the whole expenses of process in the said Court of Session; and that the said William Allan was accessory to, and concerned in the said riot and spulzie, and is liable to the appellant in the said action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st of January, and also in the whole expenses of this process in the said Court of Session; and it is further ordered and adjudged, that all the other parts of the interlocutors complained of by the said appeal be affirmed; and it is also ordered, that the Court of Session do give the necessary and proper directions for carrying this judgment into execution.

For the Appellant, *Rob. Craigie, W. Murray.*

For the Respondents, *Wm. Nicol, Wm. Hamilton.*

NOTE.—Unreported in the Court of Session.

[Elchies. Prov. to Heirs, No. 7.]

THOMAS WATSON, W.S., Trustee for, and Adjudger from, the Apparent Heir of Hamilton of Redhouse, and the other Creditors, ... } *Appellants;*

THOMAS GLASS, and the other Children of the deceased Mr Adam Glass and Helen Hamilton, his wife, and Others, . . } *Respondents.*

House of Lords, 5th December 1744.

TAILZIE—CLAUSE, PROVISION TO DAUGHTERS—OBLIGATION—"HEIRS FEMALE."—An entail bound the heirs of entail "to "pay his *daughters and heirs female,*" 10,000 merks. The entailer had only one daughter, and his son, who had succeeded under the entail, having fallen into debt, his trustee objected to pay this provision, on the ground that it was conceived only in favour of such daughter as should succeed as "heir female." Held her entitled to the provision, and affirmed in the House of Lords.

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WATSON, &C. v. GLASS, &C.

Captain Thomas Hamilton, on marrying Agnes Birnie, entered into a post-nuptial contract of 27th September 1681, whereby he agreed to infeft the said Agnes Birnie in the estate of Redhouse, for her life, and remainder to the *heirs of the marriage* in fee. By another clause in the said marriage contract, he bound himself to employ the portion agreed to be paid by his wife's father, investing it in land, and to take the securities thereof to himself, and his said spouse, in liferent, and to the heirs of the marriage in fee, which sum, the said Sir Andrew Birnie (his wife's father), thereby obliged himself to pay to the said Captain Thomas Hamilton, if in life, and failing him by decease, to Thomas Hamilton, then his eldest son, if in life; so that, by the express stipulations of this marriage contract, the lands and barony of Redhouse, and the foresaid sum of £444, 8s. 10d. sterling, were limited and secured to the heir of *that marriage*, who should happen to be alive at Captain Hamilton's death; and however the onerous debts contracted by Thomas Hamilton might have affected this fee, so limited and secured, yet no gratuitous voluntary deeds could prejudge the heir of the marriage, of the benefit of the succession, which he claimed as creditor, by the said contract of marriage.

In 1687, Captain Hamilton being anxious to preserve these lands in the male line, executed a bond of tailzie, limiting the succession of these lands, "in favour of James Hamilton, his "son, and heirs male of his body. Remainder to the other "heirs male procreate, or to be procreated of his body. "Remainder to George Hamilton, his brother-german, and "the heirs male of his body. Remainder to Captain Hamil-"ton, his own nearest heirs and assigns whatsoever. Pro-"vided always, that, in case there should be *daughters and* "*heirs female*, the heirs of tailzie should be bound and obliged "to pay his *daughters and heirs female*, one or more, the sum "of 10,000 merks to be equally divided.

Captain Hamilton died in 1688, leaving a widow, a son, James Hamilton, and a daughter, Helen, who was married to Mr Adam Glass.

The estate was much encumbered with debt, when James his son succeeded; and among these was an adjudication led in name of Helen Hamilton, for security and payment of the said sum of 10,000 merks.

A ranking and sale of the estate having been brought, the creditors objected to the debt of Helen Hamilton, on the ground that, by the tailzie 1687, the provision of 10,000

merks *to daughters and heirs female*, was obviously meant and intended to become effectual in favour of such daughter only as could claim under the legal character and description of heirs female, which was not applicable to Helen Hamilton, so long as her father left a son who was the heir of the marriage.

The respondents answered, that though the character of heir female was not properly applicable to Helen Hamilton, their mother, yet, as the sum of 10,000 merks was intended as a provision for the daughters of that marriage, who were thereby become creditors upon the estate, the respondents were, in right of their said mother (the only daughter of that marriage), well entitled to the provision, there being no other provision made for daughters; and that this clause was inserted in the tailzie 1687, with a view and intention, that in all events, whether the estate and other subjects thereby secured to heirs male, should remain with issue male of Captain Hamilton's own body, or go over to the collateral heir male, in prejudice of the *daughters and heirs female*, such daughter, or daughters, should effectually be secure of this sum.

The Lord Ordinary pronounced this interlocutor: "Find, June 15, 1743. "that by the conception of the clause in the tailzie, whereby "the heirs of entail were obliged to pay the tailzier's daugh- "ters, and heirs female, one or more, the sum of 10,000 "merks, Helen Hamilton, the only daughter of the maker of "the entail, was entitled to the provision of 10,000 merks, in "the event, which happened, of the tailzier's own son suc- "ceeding to the estate, as well as she would have been en- "titled to the said provision, if the estate had devolved upon "the collateral heirs of entail; and, therefore, repelled the "objection made to the interest produced for Thomas Glass "and his sisters." On representation, his Lordship adhered. Nov. 26, 1743. On two several reclaiming petitions to the Court, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the appeal be dismissed, and that the interlocutors complained of be, and the same are, hereby affirmed, with £50 costs.

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WATSON, &C. v. GLASS, &C.

For the Appellants, *A. Home Campbell, Al. Forrester.*

For the Respondents, *Robt. Craigie, W. Murray.*

NOTE.—Lord Elchies has the following note in regard to this case:—"An obligement in a tailzie in case there shall be daughters, and heirs female, procreate of the maker's body, alive at his death, obliging his heirs male and of tailzie, to pay his daughter, and heirs female, 10,000 merks; the question was, Whether that obligation took place where the tailzier's own son succeeded to him—whether he was bound to his sister for this 10,000 merks, since she was not an heir female, since the son was the sole heir. By our interlocutor of 15th June last, we found her entitled to 10,000 merks. Arniston owned that, at first, he was against the interlocutor, but now he is for it; and said, that providing the 8000 merks, the tocher, and the other moveables in the same way with the estate, that greatly moved him; and observed, that in money provisions in marriage contracts, 'daughters' and 'heirs 'female,' are often used to signify daughters, though there were sons; and upon the question we adhered."—*Vide* Elchies, vol. ii., p. 372.

[Elchies. Proof No. 9. Fraser's Domestic Relations, Vol. I., p. 208.]

1751.

COUNTESS OF STRATHMORE v. FORBES, &C.

COUNTESS OF STRATHMORE, . . . *Appellant;*

GEORGE FORBES, sometime Factor and Steward to the said Countess, and SUSAN-JANET-EMILIA FORBES, an Infant, lawful daughter of the said George Forbes, by the said Countess, his wife, . . . *Respondents.*

House of Lords, 20th March 1751.

MARRIAGE—COHABITATION—PROOF.—A declarator of marriage and legitimation was brought by the respondent, Forbes, founding upon marriage celebrated and performed in Scotland, by some clergyman unknown; and founding, also, on cohabitation in Scotland, and also cohabitation as man and wife in Holland. Held him entitled to a proof of the marriage, and also of the cohabitation as man and wife in Scotland, but not of the cohabitation in Holland. On advocation of this judgment of the Commissaries, the Court remitted to them to allow a proof of the marriage in Scotland, and of the cohabitation in Holland, as

an incident of that marriage. On appeal to the House of Lords, appeal withdrawn, of consent, and interlocutors affirmed.

A declarator of marriage was raised by the respondent, George Forbes, against the Countess of Strathmore, setting forth that, in 1745, he was married to the said Countess, in her own bedroom, in her dwelling-house at *Castle Lyon*, by a person of her own procuring, for that purpose, whom she called a clergyman; and from that time they had cohabited together, treated and entertained each other as husband and wife; and, in the beginning of October thereafter, while she, the said Countess, still remained at *Castle Lyon*, and he having occasion to be at Edinburgh, she, finding herself pregnant, sent for him, whereupon they resolved to set out for Rotterdam, where they arrived, and continued to reside for sometime, and where she was delivered of a female child, in May 1746; and that during their residence in Holland, they cohabited together, at bed and board, owned, treated, and entertained each other as husband and wife, and were held and reputed such by all the many persons who had occasion to know and converse with them; and, in particular, that having caused a clergyman to come and baptize the child, she, the said Countess, before, and to him, and other witnesses present, declared that she and the respondent were husband and wife, and they acknowledged and declared themselves married persons, and that the said child was their lawful child.

That afterwards it was agreed, between the appellant and respondent, that the appellant should return to Scotland, to endeavour to reconcile her friends to the marriage, he remaining in Holland, where it was stated he was obliged to remain, from his accession to the rebellion. Accordingly, she went to Scotland, but never returned to her husband's company and society; and now refused to adhere.

The Commissaries pronounced this interlocutor:—"Having "considered the process and letters produced by both parties, "allow the pursuer to prove that the defender and he were "married together, time and place libelled. And, as to the "cohabitation as husband and wife, and acknowledging one "another as such in Scotland, before answer, allow the pur- "suer to prove all facts and circumstances tending to make out "the same: And allow the defender a conjunct probation "thereanent, and grant diligence accordingly. But as to "cohabitation in Holland, libelled and condescended on more Jan. 5, 1750.

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"fully in the pursuer's duplies, they supersede the consideration thereof until the proof allowed of what happened in Scotland, is adduced and concluded."

Against this interlocutor both parties complained to the Court of Session by advocation.

Feb. 27, 1750. The Court of Session remitted to the Commissaries, with the instruction that "they allow a proof to the pursuer of the "facts that passed in Holland to be taken, and to be con "joined with the proof that shall be taken in Scotland."

Feb. 28, 1750. The Commissaries pronounced an interlocutor in terms of this remit, accordingly, allowing the pursuer a proof of all the facts and circumstances tending to make out the cohabitation as husband and wife, and the acknowledgment of one another as such, both in Scotland and Holland.

The Countess brought a suspension of this interlocutor, which was refused.

Against these interlocutors the present appeal was brought by the appellant.

Journals of the House of Lords.

But after answers were ordered to the appeal, on petition by the appellant, asking leave to withdraw the said appeal, in regard the said appeal was premature, in respect the Courts below had passed no judgment upon the sufficiency of the said George Forbes' libel, and had only allowed him a proof before answer, and praying that the said appeal be dismissed, and the interlocutors hereby complained of be affirmed.

And after hearing Mr Henry Dagge, the petitioner's agent, and likewise Mr Alex. Ross, the agent for the respondents at the bar,

It was ordered and adjudged, that the said petition and appeal be dismissed this House, and that the several interlocutors therein complained of be, and the same are, hereby affirmed. And it is further ordered, that the appellant do pay to the respondents, the sum of £40 for costs.

For the Appellant, *D. Ryder, W. Grant, W. Murray.*

For the Respondents, (*No Case given in*).

NOTE.—Lord Elchies has the following note in regard to this case: "The Commissaries allowed him to prove the actual marriage, and before answer to prove all facts and circumstances tending to make out the cohabitation as husband and wife *in Scotland*, but superseded the proof of cohabitation in Holland, till the other proof be concluded. Both parties presented bills of advoca-

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tion; the lady for allowing him any proof at all, because he was doubtful of bringing a direct proof of the actual celebration. Forbes, on the other hand, for superseding the proof of cohabitation in Holland. None of us made any difficulty of refusing my lady's bill; but we differed as to the other. The chief argument for the interlocutor was that cohabitation in Holland, even as man and wife, does not infer marriage without proclamation of banns, or, rather, as the President observed, without appearing before the burgomaster, and registering their names. On the other hand, the President observed, two cases in the Court, one of Hamilton of Grange, which had been brought here in several different shapes, first, by repeated advocations from the Commissaries, afterwards by suspension, and also by reduction, in which, at least, he was himself one of the counsel, where the question occurred and was fully argued, and a proof followed of cohabitation in England; and, in a later case of Lord Semple, the Court refused a proof of cohabitation at Gibraltar, only because they would not condescend on the witnesses. That though nothing could have the civil effect of marriage in Scotland, but celebration *secundum legem loci*, yet *consensus et copula* even in Scotland would make a good marriage in Scotland, and it was not an agreed point, whether cohabitation in Holland would not have the same effect; but that was not there the question, but the proving a marriage entered into in Scotland, where subsequent cohabition in Holland would have a strong effect; that it did not signify whether the pursuer knew or did not know who was the celebrator, yea, even though it had been another footman; the *consensus de presenti* and the subsequent *copula* would make a marriage. I was of the same opinion, and observed the danger as well as expense of dividing the proof without necessity. The inconveniency insisted on, of exposing characters, did not move me after the process had gone thus far. And, as to the last, that as for the most part, the celebrator is provided by the husband, the poor woman very seldom knows, in clandestine marriages, whether he is a minister or not. The Lords remitted, with instruction to the Commissaries, to allow the pursuer to prove all facts and circumstances of the cohabitation in Holland at the sametime with the proof already allowed.—*Pro.* President Dun, Monzie, Murkie, Shewalton, Drummore, reported *et ego. contra*, Minto, Strachen, Kilkerran."—*Vide* Lord Elchies' Notes, vol. ii., p. 365.

1751.

MONTGOMERY-MOIR v. MONTGOMERY-MOIR.

[Elchies, vol. ii., p. 193; Fraser's Domestic Relations, vol. I., p. 456.]

GEORGE MONTGOMERY-MOIR, Esq. of Leckie, *Appellant;*
ANNE, his wife, and Others, . . . *Respondents.*

1751.

MONTGOMERY-MOIR v. MONTGOMERY-MOIR.

House of Lords, 24th April 1751.

Separation and Aliment—Cruelty.—The respondent raised an action of separation and aliment against her husband, the appellant, on the ground of cruelty and a calumny published by him against her honour and reputation. It was objected, that there was no relevant statement to support the action. The Commissaries allowed a proof of the libel. On advocation the Court refused the bill, but remitted, with instructions to the Commissaries, to allow a proof only of such facts as appeared material, and of the publication alleged. Proof of the calumnies on the part of the husband was allowed. The Commissaries found facts and circumstances proved relevant to infer separation. On bill of advocation the Court refused the bill, and remitted to the Commissaries. In the House of Lords reversed, and held the evidence not sufficient to support the conclusions for separation and aliment.

An action of separation and aliment was brought before the Commissaries by the respondent, Mrs Montgomery-Moir, against her husband, the appellant, on the ground of cruelty.

Her summons set forth various articles, but set forth the "following: That the defendant, contrary to the duty of the "relation betwixt them, had attacked the pursuer, his wife, "most calumniously, and injuriously in her honour and re-"putation, and had behaved to her in such manner, that she "could not live or abide with him in safety; that he wrote a "letter to Sir Walter Montgomery, her uncle, in which he "loaded her with the grossest calumnies, without any manner "of foundation in truth, and endeavoured, all that in him "lay, to wound her reputation, in a manner hitherto not "to be paralleled betwixt husband and wife; and, therefore, "concluding for a separation *a mensa et thoro*, and for separate "aliment."

Her statements assumed, afterwards, the following four heads, 1st, That from the time of their marriage to that of their separation, the appellant had lived with the respondent in a course of discontent and passion, which broke out into several contumelies and abuses, and at last had proceeded so far as to threaten to pistol her. 2d, That he had agreed to a separation from the respondent, and with that view had taken from her the marriage ring, and some other trinkets, which he had given her before marriage. 3d, That he had grossly abused her character in a letter to her uncle, Sir Walter Montgomery; and 4th, That he had procured and

raised letters of inhibition against her, upon false and calumnious allegations. 1751.

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The appellant's defence, after stating in full detail the facts of their marriage, and how, in a few weeks thereafter, she got uneasy and discontented in her mind, alleging to her friends doubts of his manhood—that he was defective, and that she could never have children by him, all of which, had they been true, might have warranted a divorce against him, was confined to the statements of the respondent, which he denied. 1st, As to the menace to pistol the respondent, he exhibited a letter from Sir Walter Montgomery, her uncle, by which it appeared, that both he and his niece understood *that* threat to be directed only against her informers, the authors of the scandalous calumnies against the appellant's sister. 2d, He denied that he had agreed to a separation, but that the respondent having, in a great passion, thrown away the wedding-ring, and other trinkets, the appellant took them up. 3d, That the appellant had tried every method of lenity to reclaim his wife, and, out of tendernessfor her reputation, concealed the genuine source of their differences, until, by her obstinacy, he thought it became his duty to communicate the matter to her uncle, Sir Walter, hoping that by his interposition and advice, the respondent might still have been brought to a proper temper. This letter was written to one who stood in the relation of a parent to his wife; and if she or her uncle afterwards published this letter, they had themselves only to blame. 4th, The respondent refused to come home to his house. He used every effort to induce her to come, stating, that she would be affectionately received, and would have the entire and absolute control of his house. He even wrote her uncle, with whom she lived, to second his efforts to induce her to come home. And all these failing, he was obliged to resort to inhibition, but it contained nothing calumnious, but only the usual form of words.

The Commissaries pronounced this interlocutor: "Having Aug. 15, 1748.
"considered the libel, missive letters in process, defences,
"answers, replies, and duplies, they, *before answer*, ordain
"the pursuer (*i.e.* respondent) to give in a special conde-
"sendence of such facts and circumstances as she desires
"to lead a proof of, and to condescend upon the witnesses by
"whom she is to prove the same; and allow the defender
"(appellant) to give in a special condescendence of such
"facts as he desires to prove, and of the witnesses by whom
"he is to prove the same."

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In obedience to this interlocutor, a condescendence was given in for the respondent, which varied very little from the libel; and the appellant thereupon objected, that there were no facts stated relevant to infer the conclusions of her libel, and, therefore, that the same ought not to be admitted to proof.

Nov. 18, 1748. But the Commissaries, of this date, pronounced this interlocutor: "Having considered the libel with the condescendence for the pursuer of the 2d November, and whole debate thereanent. Before answer, allow the pursuer a proof of the several facts and circumstances contained in the libel and condescendence; and allow the defender a proof of all the facts and circumstances tending to his vindication; and allow each party a conjunct proof anent the premises."

The appellant brought a bill of advocation to the Court of Session against this interlocutor.

The Lord Ordinary, after advising with the Court, pro-
Jan. 13, 1749. nounced this interlocutor: "Refuses the bill of advocation, but remits the cause to the Commissaries, with this instruction, that they allow a proof of such articles of the libel, *only* as appears to them to be material: and particularly, that they allow a proof of all the facts and circumstances, that may tend to show that Boquhaple's letter was published with the defender's knowledge and consent, or by his advice and information of the facts, or any of them therein contained; or that the defender, by letters, conversation, or otherwise, published the facts contained in the said letter, or any of them: and further, that the pursuer sustained any injuries or maltreatments from the defender while they lived together."

On the case coming back to the Commissaries, they pro-
Jan. 20, 1749. nounced an interlocutor, allowing a proof in terms of the above remit. On petition from the appellant they pro-
Feb. 3, 1749. nounced this interlocutor: "Having reconsidered their interlocutor of 20th January last they adhere to the said interlocutor, and further, allow the pursuer to prove that the calumnies contained in the defender's letter to Sir Walter Montgomery of the 1st July 1745, were uttered, spoke, or published by the defender (against the pursuer), in conversation or otherwise, or by others, by his knowledge and consent, or by his advice, and information of the facts therein contained or any of them. And allow the defender a proof of all facts and circumstances tending to his vindication."

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The proof was gone into. On that proof, the appellant contended, that the respondent had failed to prove either cruel conduct by him towards her, or maltreatment of any kind, not even that he was of a bad temper, though the witnesses were all composed of her uncle's servants and dependents, except one solitary instance. The Commissaries were pleased to find, "Facts, circumstances, and qualifications "proven relevant to infer separation, and aliment to the pur- "suer, and the expenses of suit, but before modification of "the aliment, allowed the pursuer to give a condescendence "of the defender's estate." Jan. 9, 1750.

The appellant brought a bill of advocation to the Lords of Session. The Lord Ordinary pronounced this interlocutor: June 8, 1750. "After advising with the Lords, refuses the said bill, but "*remits the cause to the Commissaries, with this instruction, to* "*consider the proof, and to find that there is no sufficient evi-* "*dence adduced to support the conclusion of separation and* "*aliment*, in the summons at the pursuer's instance against "the defender, and to proceed in the cause accordingly." On reclaiming petition to the Court, the Court, by interlocutor, of this date, "refused the defender's bill of advoca- Dec. 7, 1750. "tion simpliciter, and remitted, and hereby remit the cause "to the Commissaries."

This last interlocutor virtually altered the one immediately preceding.

The appellant, therefore, brought his appeal to the House of Lords against the interlocutor of 9th January and 7th December 1750.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutors of the 9th January 1750 and 7th December 1750 be, and the same are, hereby reversed. And it is hereby further ordered and adjudged, that the said interlocutor of the 8th of June 1750 be, and the same is, hereby affirmed.

For the Appellant, *A. Hume Campbell, Geo. Lee, Alex. Lockhart, Geo. Hay.*

For the Respondent, *Wm. Grant, W. Murray.*

NOTE.—Lord Elchies has this note on the case: "I was against the separation; yet, in further considering the case, I altered my

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opinion. I thought—that the lady having on her husband's information, been represented to the world as a monster of nature for lasciviousness, and a reproach to her sex, and which scandal has, by the husband and his counsel, in all their writings and pleadings, been maintained to be true, though they said it was impossible to prove them—I thought it impossible that thereafter they could live together as husband and wife, that he could wish to take her again to his bosom, or that she could live with the man who, in effect, declares that she is unworthy of living, and who had for ever debarred her from the society of every modest woman who would believe him. That though his justification from the imputation of impotency, wherewith she is said to have reproached him to one or two of her confidants, had made excusable in him to inform his nearest friend of her insatiable appetite, yet he must, at the same time, have resolved to separate from her, because they could not, consistently with the honour of either of them, thereafter live together; and whenever matters came to that pass, the Court could not refuse a separation, and he was to aliment her so long as she was his wife; at the same time, I saw no necessity for such vindication, nor evidence of the truth of what he reproached her with, and far less saw I necessity of propagating that scandal to so many, or maintaining it in courts of justice. Kilkerran also changed his opinion; and, upon the question, it carried to alter the last interlocutor, and to refuse the bill of advocation *simpliciter*. *Pro*—Lords Minto, Drummore, Kilkerran, Justice-Clerk, Murkle, Shewalton, *et* me. *Contra*—Lords Dun, Haining, and President; but Leven was *non liquet*, and Milton in the Outer House."—*Vide* Lord Elchies' Notes, vol. ii., p. 193.

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HIS MAJESTY'S ADVOCATE v. DRUMMOND.

[Kames, Sel. Dec., p. 18.]

HIS MAJESTY'S ADVOCATE, . . . *Appellant;*

MARY DRUMMOND, only Daughter of the marriage between James, Lord Drummond and Lady Jane Gordon, . . } *Respondent.*

House of Lords, 3d April 1753.

PROVISION TO HEIRS AND CHILDREN—ANTE-NUPTIAL CONTRACT—IMPLIED CONDITION.—By an ante-nuptial contract, provision was made for daughters, if one, of 40,000 merks, if two, 50,000 &c., payable at their respective ages of eighteen, or on marriage, providing that these should be in full of all they could claim as natural portion, or bairns' part of gear, which they, or either of

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them, as heir, or heirs of line, or at law, might claim. The respondent was the only daughter, and she claimed the 40,000 merks when eighteen years of age; but it was objected that this clause supposed that the daughters were only to be paid the provision upon failure of issue male of the marriage, and, therefore, that it was conditional. Held her entitled to her provision. Reversed in the House of Lords.

By contract of marriage between Lord Drummond and Lady Jane Gordon, in consideration of the marriage portion of 40,000 merks, Lord Drummond bound himself to settle and grant procuratory for resigning the lands and lordship of Drummond, to, and in favour of himself and the heirs male of the marriage; whom failing, to the heirs male of his own body of any other marriage; whom failing, the heirs male and of tailzie and provision, created in the infeftment of the estate.

This contract made provision for daughters, one or more, procreated of the said marriage, in case there should be no issue male of the marriage surviving the dissolution thereof, in the following terms: "If there be but one daughter, the "sum of 40,000 merks, Scots money; and, if there be two "daughters, the sum of 50,000 merks, Scots money, foresaid; "and, if there be three or more daughters, the sum of 60,000 "merks, to be divided amongst them." These provisions he bound himself and his heirs to pay "to the said daughters, *at "their respective ages of eighteen* years complete, or marriage, "which of them shall first happen after the dissolution of our "said marriage." And these provisions were declared to be "in full satisfaction to the said daughter or daughters, of all "portion natural, bairns' part of gear, and other benefit what-"soever, which they, or either of them, as heir, or *heirs of line*, "or any other manner of way may ask or claim," &c.

Of this marriage there were two sons, and one daughter, the respondent.

Having charged his estate with large debts, he, after the birth of his son, executed a deed by which he intended to divest himself of the fee of his estate, which he did by a deed in favour of the said son, reserving to himself an estate for life, subject to the payment of the annual interest of the debts.

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This deed had this clause, "Also reserving full power "and liberty to us, the said James, Lord Drummond, to "provide the daughters and younger sons procreated, or to

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"be procreated of our body, with such suitable provisions, "not exceeding the sum of 120,000 merks; and further, "reserving to us power and faculty to provide a second wife "to a reasonable jointure, not exceeding 5000 merks."

In 1715, Lord Drummond was attainted for high treason, and his estates confiscated to the Crown.

No claim was made at the time for the respondent's provision.

Thereafter Lord Drummond's son, under an exception of the Act of Parliament, made a claim for restoration of the estate, on the ground that the fee of the estate was vested in him by the above disposition of 1713. This exception was allowed.

James, the elder brother of the respondent, granted a bond to the respondent for £1000, payable at the first term of Whitsunday or Martinmas, that should happen after her marriage.

The estates thereafter descended to James' younger brother, John, Lord Drummond, who was also attainted in 1745, and his estate forfeited, and the respondent now, after twenty years' silence, claimed, for the first time, before the Commissioners of his Majesty, 1st, For the 40,000 merks in the marriage contract; and, 2d, On the bond for £1000, granted by James, her brother.

The appellant contended that, in the present case, the inductive cause of the provision being, that the estate was tailzied to heirs male, and the provision itself being to females, made it evident that the provision was only intended to take place failing issue male of the marriage, and therefore that this must be understood as a conditional provision, which was not purified by the existence of the condition.

July 11, 1752. The Lords pronounced this interlocutor: "On the report "of Lord Minto, the Lords sustain the claim for the 40,000 "merks provided by the contract of marriage to the only "daughter of that marriage, and for the annual rents thereof, "from Lammas 1725, being the first term after the claimant's "attaining to the age of eighteen years, and decern."*

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Crown.—1. That the obligation in the con-

* The same interlocutor sustained the claim on the £1000 bond, granted by her brother, James.

tract of marriage to pay the sums or provisions therein mentioned, is by no means absolute, but is to pay the respective sums to *the said daughters*, that is, to the daughters secluded from the succession by the tailzie, or settlement, of the estate, to the heir male; and a daughter, such as this respondent, who had two brothers of that same marriage, who successively took, or were entitled to take, was not a daughter *so secluded from the succession*, by virtue of the tailzie, or destination, of the estate to heirs male; and, therefore, is not *such a daughter*, or one of the *said daughters*, in favour of whom the stipulations in this clause are conceived. The obligation was therefore conditional, and not pure.

2. The provision by the contract is given to one or more daughters of the marriage, in satisfaction of all that she or they could claim, or take, as heir, or *heirs of line*, or at law, to the Lord Drummond; and such heir, or heirs, she, or they, could not possibly be, so long as one or more sons of the same marriage should exist.

3. The construction for which the appellant contends, is agreeable to the common usage in Scotland in marriage settlements, and the sense in which the respondent, her parents, and family have, for so many years, understood the contract.

Pleaded for the Respondent.—1. By the marriage contract, the estate of Perth is limited to heirs male of Lord Drummond's body, of the then intended marriage, whom failing, to his collateral heirs male and of tailzie; and intending to make a provision for daughters, the father obliges himself and *his heirs foresaid*, to pay the particular sums mentioned in the deed to the daughters, at the terms therein mentioned; and therefore to say that the heir male of the marriage, who is the first taker by the contract, was not bound to pay the provisions to the daughters, is inconsistent with the very deed he takes.

2. Contracts of marriage depend upon the agreement of the parties, and must be construed according to their expressed intention. There is no established form of such contracts in Scotland. James, Lord Drummond, had certainly power to make this provision for a daughter, and it cannot be thought unreasonable that the only daughter of the marriage should have her mother's fortune.

3. The motive for limiting portions to daughters in the marriage contract, was the total exclusion of daughters from the estate, by the ancient settlements of the family, confirmed

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by that contract, and the provision for the daughters ought to be equally extensive with their exclusion, and, consequently, every person who took by virtue of the settlements, was bound to pay these portions.

4. Although the exclusion from the estate was the motive of the provision in the deed, yet it was not the only consideration of it; for it was given in full satisfaction of every provision which they were entitled to.

5. James Drummond, though he did not particularly charge the estate with 40,000 merks provided for the daughter of the marriage, yet he reserved a power to charge the estate with a much larger sum for younger children, and, at the time he made the conveyance, it was uncertain what younger children he might have at his death. At the time of the claim by the trustees of the respondent's brother, she was an infant of very tender years, and nothing was then due to her, and the money, secured to the respondent by her mother, is only payable at her mother's death; so that, if the respondent cannot have the benefit of the provision made for her by her father, she will be excluded from any share whatsoever in her father's estate, both real and personal.

After hearing counsel,

It was ordered and adjudged, that the said interlocutors and decree complained of in the said appeal be, and the same is, hereby reversed. And it is further ordered that the claim given in before the said Court of Session, on behalf of the respondent, so far as the same relates to the said 40,000 merks Scots, and the annual rent, or interest thereof, be, and the same is, hereby dismissed.

For the Appellant, *D. Ryder, Wm. Grant, W. Murray.*

For the Respondent, *A. Hume Campbell, Alex. Lockhart.*

NOTE.—Lord Elchies has this note:—"The Lords, on a division, seven to six, sustained the claim. *Against*—President, Duke of Argyll, Kilkerran, Justice-Clerk, Leven, *et* me. *For the interlocutor* were Minto, Drummore, Strichen, Kames, Murkle, Shewalton, Woodhall. I should have noticed, that the claimant quoted the cases of Anderson's daughters, 13th February 1722, affirmed in Parliament, and of the daughter of Hamilton of Redhouse."

Ante, Watson v. Glass.

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MARCHIONESS-DOWAGER OF ANNANDALE, only Child and surviving Trustee and Executrix of John Vanden Bempde, Esq., deceased, ... *Appellant;*

MARQUIS OF ANNANDALE; and RONALD CRAWFORD, Clerk to the Signet, . *Respondents.*

House of Lords, 18th February 1755.

TRUST USES—ACT OF PARLIAMENT—EXECUTION OF THE TRUST.—Held where the money, personal estate, rents, &c., belonging to a trust estate, were specially directed by the truster's will, to be laid out in the purchase of land in England, though by Act of Parliament, power had been given to appropriate certain accumulations of these rents, &c., in purchasing up debts affecting the Annandale estates in Scotland, to which the beneficiary had succeeded, yet that the trustees and executors under the will, were still entitled, on a favourable purchase of land offering in the counties named in the will, to recall the money so lent out, and to purchase the estates.

William, the late Marquis of Annandale, intermarried with the appellant, his second wife, and died leaving issue by her, the present Marquis, (George), and Lord John Johnston.

John Vanden Bempde, the appellant's father, by his will, "devised all his real estate whatsoever in England, to John, "Duke of Argyle and Greenwich, to the appellant, and "Simon Mitchell, and Robert Holford, Esqrs., and their "heirs, to the use of them and their heirs upon trust; in the "first place, to pay the appellant an annuity of £300 for "her life, and proper maintenance for her two sons, until "their ages of twenty-three. And after either of them "should attain that age, in trust, to settle and assure, as "counsel should advise, his said real estate (except that in "Berks), subject to the annuity, to and upon the said Marquis, "for life, without impeachment of waste; with remainder "to trustees to preserve contingent uses. After his decease, "to the first and every other son of his body, lawfully issuing "in tail male, with divers remainders over. And the said "testator directed, that his personal estate should be sold "and disposed of, and the money arising thereby, as well as "what should be received by the rents of his real estate,

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" should be laid out in the purchase of lands of inheritance, " to be settled to the same uses. And that, until such pur- " chases should be had, all the income, increase and interest " of his personal estate, should be applied in the same manner " as the profits of the estate to be purchased therewith, ought " to go. And the said testator, by his said will, recommended " to his executors, the making purchases near to his York- " shire estates, or in any county leading to it; or else in Kent " and Berkshire, if fair opportunities offered. And that, in the " meantime, the money should be placed out at interest upon " securities, in the names of his executors; and appointed " the said John, Duke of Argyle, the appellant, Simon " Mitchell and Robert Holford, executors; and the appellant " and Simon Mitchell alone proved the will."

The said Lord George and Lord John, by their next friend, and the said late Duke, and Robert Holford, exhibited their bill in the Court of Chancery against the appellant and Simon Mitchell, for an account of the testator's personal estate, and for the rents of the real, and that the same might be laid out according to the directions of the will.

Upon hearing the said cause, it was decreed, "That it " should be referred to Mr John Bennett, then one of the " Masters of the said Court, to take an account of the said " testator's personal estate, and of the rents and profits of his " real estate, come to the hands or use of the appellant, and " the said Simon Mitchell. And it was thereby ordered that " the trusts in the said testator's will, should be performed; " and receivers were directed to be appointed by the said " Master, of all the said testator's real estates, who were " annually to account and pay the balances, as the Court " should direct; and what of the personal estate, and the " rents of the said real estates should appear to be received " by the appellant and Simon Mitchell, was directed to be " laid out in a purchase of lands, to be approved of by the said " Master, and taken in the names of the said trustees, and " settled according to the directions of the said testator's " will, and the surplus profits of the testator's real estates " were directed to be laid out and settled in the same manner. " And until such purchases could be found out, the personal " estate, and the profits of the real estate, were to be placed " out at interest on securities to be approved by the said " Master, and taken in the names of the said trustees; and " when either of the said testator's grandsons should attain " the ages of twenty-three years, they were to be at liberty

"to apply to the Court for conveyances of the said real "estates.

"The Master made his report, certifying that the personal "estate, with the produce thereof, and rents of the real "estate, amounted to £27,124, 18s. 9d.

"The present Marquis, by the death of James, his father's "eldest son, by his first wife, succeeded to the honours and "estate of Annandale, which then stood charged with debts, "secured by adjudication and infeftments to a considerable "amount, which carried interest at the rate of 5 per cent. "per annum; and as the present Marquis was greatly dis-"tressed thereby, and no convenient purchases had offered, "an Act of Parliament was obtained, whereby it was enacted "That such person or persons as were enabled, by the said "testator's will, to act in the trusts, should and might, with "the direction and approbation of the said Court of Chancery, "pay and apply any part of the said testator's personal "estate, or the produce thereof, or the rents and profits of "his real estate, or the increase thereof from time to time, "until either of the said testator's grandsons should attain "the age of twenty-three years, to and for the purchase of "adjudications obtained and to be obtained against the said "Marquis' estate in Scotland, or of other securities covering "the said estate, and carrying interest at the rate of 5 per "cent. per annum, upon such assignments or dispositions of "such adjudications and securities, to and for the same uses "and trusts, as by the said will are declared of, and concerning "the said trust estate as should be directed or approved by "the said Court of Chancery, and that the same should "remain with the said trust estate, or with those to whom "the same should thereafter be conveyed, as a security only "for the principal sums, interests, and costs, paid out of the "said trust estate, for the assignments of such adjudications "or securities, and should not remain absolute rights, though "not redeemed in due time. And it was provided, That the "said provision should cease, after the said trust estate should "come into, or be vested in a different person from him or "her, who should enjoy the said estate of Annandale, and "the legal of such adjudications should commence to run "according to the rules of law in Scotland, and expire agree-"ably to the same, in ten years thereafter, if not redeemed "by payment of the principal, interest, and costs, as afore-"said, and no sooner."

Pursuant to this Act, the appellant and Simon Mitchell,

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before the Marquis attained his age of twenty-three years, with the approbation of the Court of Chancery, applied part of the testator's trust money to purchase debts, secured by adjudications and infeftments, on the estate of Annandale, and took assignments thereof in their own names, as trustees for the purposes, and to the uses mentioned in the said testator's will, concerning his personal estate and the interest thereof; which, with the sum of £2500, advanced before the Act was obtained, and the interest thereof, to the 26th May 1743, amounted to the sum of £20,403.

The Marquis of Annandale attained his age of twenty-three years, before which time his brother, Lord John, had died unmarried and without issue.

The Marquis applied by petition to the Court of Chancery, whereupon an order was made to the effect of letting him into the possession and enjoyment of those estates; and the receivers of those estates were discharged from receiving any rents, since 29th May 1743.

The Marquis granted a bond of corroboration for the above sum of £20,403, and interest, being the debt on the estate of Annandale, whereby he bound and obliged himself and his heirs to content and pay to the appellant and Simon Mitchell, the said sum, and bound himself to infeft them in the estate of Annandale, in security, but redeemable on payment of the said sum. The trustees were infeft accordingly.

An order was further obtained, on report of the Master, for the trustees to lend of the trust funds £16,000, 15s. 3d. more, for the purchase of the debts, which was done accordingly, and which debts were assigned to them as trustees, as in the former case, the debts then amounting to £36,503, 15s. 3d.

Dec. 5, 1744. A charter was obtained under the Great Seal of Scotland, upon the conveyance, to one of the said adjudications in favour of the appellant and the said Mr Mitchell, who were again infeft in the whole estate of Annandale, according to the law of Scotland, 6th December 1744. The object of this was to exclude the Marquis' posterior creditors.

The Marquis, whose ordinary residence was in England, unfortunately falling into a state of lunacy, and so continuing, a commission under the Great Seal of England was issued, and by an inquisition taken thereon, he was found a lunatic,

Mar. 5, 1747. and that he had been so for some time past, whereupon the custody of his person was soon after given to the appellant.

The appellant applied to the Court of Chancery, "That

" it might be referred to the Master to appoint a receiver or " receivers, of the arrears of rents and growing rents, of the " testator's trust estates, which was ordered, and receivers " were soon after appointed accordingly."

And upon the receivers applying to the said Ronald Crawford, the respondent (who, during the Marquis' insanity, had been by him appointed the principal factor or receiver of his whole estate in Scotland, and the manager of it), to receive the interest of the said sum of £36,503, 15s. 3½d., that had accrued due, since the inquisition finding the Marquis a lunatic, he refused to pay it, or to apply any part of the money in his hands or the growing rents, which now amount to a very large sum, towards the Marquis' maintenance, which refusal had been owing to a claim made by the then Countess Dowager of Hopetoun, the sister of Marquis William, who claimed to be entitled to all the present Marquis' personal estate in Scotland, if she survived him, to the exclusion of the appellant, his mother, and of Richard Bempde Johnston, and Charles Johnston, his two brothers, and of Charlotte Henrietta Johnston, his sister, her children by her second husband; and insisted that the interest in arrear since the suing out of the said commission, and thereafter the interest to grow due upon the said sum of £36,503, 15s. 3d., together with the surplus rents and profits of the said Marquis' real estate in Scotland, should be retained and accumulated there, and go to his representatives, according to the law of that part of this kingdom, in case the said Marquis should die without recovering his mind.

Thereupon the appellant laid the whole matter before the Lord Chancellor, who has the care of both the person and estate of lunatics, stating, that opportunity having occurred of purchasing estates in England, in terms of the will, whether it might not be advisable to call up the principal sum and interest of the said money, so lent out, and invest the same in the purchases.

The matter came to be heard before the Lord Chancellor, and, upon hearing counsel for the appellant, and for the said Lady Hopetoun, and for the said Richard Bempde Johnston, Charles Johnston, and Charlotte Henrietta Johnston, and for the receiver, and all the other parties interested in the cause, his Lordship was pleased to refer to the Master to inquire if it was for the benefit of the trust to call in the trust money in Scotland. The Master having reported that it would be beneficial, the Lord Chancellor ordered the trustees to proceed

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in Scotland to call in the trust money there, in order to be laid out in England, pursuant to the testator's will.

Soon after this order Mr Simon Mitchell died, but the appellant, the surviving trustee, instituted an action in the Court of Session in Scotland, against the respondents, in order to recover possession of the said estate in Scotland, and to receive and uplift the rents and profits thereof towards satisfaction of the said principal sum of £36,503, 15s. 3d., and growing interest thereof, and to compel the said Robert Crawford to pay and apply the said Marquis' money in his hands to discharge the arrears of interest due for the same.

In bar of this action the respondents pleaded, That it appeared from the face of the title upon which the appellant founded her action, that the estate was only a trust in her for the benefit of the respondent during his life; and the respondent being for his life both *debtor* and *creditor* in the securities which the appellant claimed, no action could be maintained by the law of Scotland for calling in these securities, while the respondent lived; that as it was stated in the said Act of Parliament, the application of the said trust estate, in purchasing assignments of adjudication and other incumbrances on the Marquis' Scots estates, would be highly *beneficial* to the said Marquis, and would not only be an increase of the said trust estate, by gaining an interest of 5 per cent. for the money laid out, but would also be agreeable to the intention of the testator, who, in his said will, expressed a great desire to support the honour of Annandale, while it should be enjoyed by his descendants; therefore no evidence could be admitted to show that such application was not *beneficial* to the trust estate, or was disagreeable to the testator's will, and ought not to continue while the honours and estate of Annandale were enjoyed by the present Marquis, a descendant of the testator; that the calling in the said trust money lent to the Scots estate, was, at this time, inconsistent with the directions of the Act of Parliment, for the Act provided that the adjudications conveyed to the trustees should only subsist as securities for the principal sums, interest and costs actually paid, and should not become *absolute rights* by the non-redemption, as long as the trust estate, and the estate of Annandale should be possessed by the same person; and that only after the separation of these estates the legal of the said adjudications should begin to run; but though both estates did not belong to the respond-

ent, yet, if the trustees should be authorised to assign to strangers, once the right was vested in them, the *legal* would begin to run, and the adjudications might become *absolute rights of property* to the estate of Annandale, even while that estate, and the trust estate were possessed by the present Marquis, contrary to the intention of the testator and to the intention of the said Act of Parliament; that if the appellant prevailed in her present suit, that expedient, which the legislature intended for the present Marquis' family and paternal estate, must inevitably turn out to be the certain destruction of both, for the appellant's claim amounted to near £60,000, which, by an adjudication, might be immediately converted into a new capital, bearing interest, and in a few years carry off an estate which produced only £2000 per annum.

The respondents further pleaded, That even supposing the action was, in the present case, maintainable at the instance of the appellant, yet, as the present Marquis was clearly entitled under the will of the testator, under the Act of Parliament, and under the said order of the Court of Chancery in England, 1st August 1743, to retain to his own use the interest of the said £36,503, the appellant could have no right to recover any interest, far less the interest become due before bringing the said action.

The Lord Ordinary reported the case to the Court. The Court pronounced this interlocutor: "The Lords, on the "report of Lord Woodhall, Ordinary, find, that there lies no "action at the instance of the pursuer (appellant) against "the defenders, either for the principal sum or annual rents "in question, during the life of the Marquis of Annandale; "and remitted to the Lord Ordinary to proceed accordingly."

Aug. 1, 1754.

In pursuance to this remit, the Lord Ordinary pronounced this interlocutor: "Assoilzie the said George, "Marquis of Annandale, and Ronald Crawford, his factor, "and the whole other before-named persons, defenders, from "the foresaid summons and action so raised and pursued "against them, at the instance of the said Charlotte, Marchioness-Dowager of Annandale, and John Dick, her factor, "and from the whole articles and conclusions thereof; and "decern and declare them, the said George Marquis of Annandale, Ronald Crawford, and the whole other before "named persons, defenders, to be free thereof, and quit "therefrom, now, and in all time coming."

Aug. 2, 1754.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The testator, by his will, directed, that his executors and trustees should dispose of his personal estate, and the rents and profits of his real estate, to be laid out in the purchase of lands in English counties, and settled to the same uses with his other real estate; that the income and interest of the trust money, should be applied in like manner as the profits of the lands to be purchased; and that, in the meantime, the money should be placed out upon securities, in the name of his executors; and, therefore, the appellant, as surviving trustee, has a clear right to call in the trust money, and purchase lands, especially when acting under the direction and by the authority of the Court of Chancery, which has the sole jurisdiction in all cases of trust, relative either to real or personal estates in England.

2. The Act of 7 Geo. II. was not intended to alter, but effectuate the will of the testator. It was doubted whether the Court of Chancery could order, or would approve of any part of the trust money being applied to purchase in the incumbrances upon the Annandale estate in Scotland. At the same time, it was thought most beneficial for the Marquis, and agreeable to the will of the testator, who had declared his intention that his estate should go with the honour (whilst the honour continued in his family), to place it out for some time on the Marquis' estate in Scotland. To that end, the Act has empowered the trustees to apply the trust money in purchasing such securities affecting the Annandale estate, as carried an interest of 5 per cent., and to take such assignments of these securities as the Court of Chancery should approve. But, neither by the words nor the intention of the Act, are the trustees deprived of the discretion which the will of the testator gives them, to purchase lands at any time, even during the life of the Marquis, when it might be convenient. And after the Marquis had fallen into his present unhappy condition, the trustee, who petitioned the Court of Chancery for directions, and the Court which made the order, 29th July 1751, judged it most proper to call in the money, and lay it out in the purchase of land.

3d, The money laid out in purchasing the securities affecting the Annandale estate, is still as much a part of the trust estate in England, as if it had been placed out upon mortgage of lands in any of the counties mentioned in the testator's will, or elsewhere in England. And the Act is so carefully

framed to prevent the possibility of any other construction, as that (contrary to the rule of law of Scotland), it has indicated the adjudications obtained and assigned upon the Annandale estate, to be a security only for the principal sums, interest and costs, paid out of the trust estate, and not to become absolute rights, *though not redeemed in due time* (so long as the estate of Annandale, and the trust estate, shall continue in the same person). This provision was made in order to enable the trustees to call the trust money, when it might be best to do so. It is therefore evident, that the placing out the money upon the Annandale estate, according to the Act, was not intended to make any alteration on the rights of persons, who might be entitled to it on the death of the Marquis. And the Court of Chancery, considering a thing directed to be done as done, and money devised in trust to be laid out in land as land, has declared the principal money invested in those securities to be part of the Marquis' real estate in England; in like manner as it would have considered the profits of the land itself.

4th, As the power over the *trust money* is given by the testator's will, to his trustees and executors, not diminished or varied by the Act of Parliament, so, likewise, the assignments of all securities on the Annandale estate are made to them. The surviving trustee is, therefore, the only party to put those securities in suit, and the motives to it are just and reasonable. The testator had directed the trust money to be laid out in lands *in England* when convenient purchases should offer. Such purchases did offer, which led to the order obtained in Chancery, to call in the trust money, for which purpose this suit is raised.

Pleaded for the Respondents.—They pleaded precisely as set forth in this case, *ante*, p. 702.

After hearing counsel,

It was ordered and adjudged by the Lords, that so much of the said interlocutors of the 1st and 2d August 1754, as relates to the principal sum, £36,503, 15s. 3½d., in question in this cause be, and the same is hereby reversed: And it is further ordered, that the action at the instance of the appellant for the said principal money be sustained: And it is hereby further ordered and adjudged, that the rest of the said interlocutors be affirmed without prejudice to the respondent, the Marquis,

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or any person lawfully authorized on his behalf, to bring such action, or take such remedy for obtaining satisfaction out of the rents and profits of the estate in question, for such annual rent or interest of the said principal sum as hath accrued since the said Marquis attained his age of twenty-three years, or any part thereof, as shall be competent in that respect and as they shall be advised; and that the said cause be remitted back to the Court of Session to proceed therein, pursuant to this order, and according to law and justice.

For the Appellant, *Wm. Murray, C. York.*

For the Respondents, *Robt. Dundas, A. Hume Campbell.*

NOTE.—Unreported in the Court of Session.

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[Mor. 7638, et Kames' Sel. Dec. p. 42.]

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The DUKE OF DOUGLAS, . . *Appellant;*

JOHN LOCKHART of Lee, and JAMES SOMERVEL of Corehouse, . . *Respondents.*

Et e Contra.

House of Lords, 27th March 1755.

ACT 24 GEO. II., c. 44—JUSTICES OF PEACE.—An action was raised against Justices of Peace for neglect and failure in the performance of their duty. They pleaded the Act 24 Geo. II., c. 44, as protecting them in the execution of their office. Held that this Act applied to Scotland. Reversed in the House of Lords.

This was an action founded on certain Acts of Parliament inflicting penalties upon the justices of the peace for the breach or neglect of their duty as justices, besides being bound to indemnify the private party. These Acts were 54 James I., c. 2; 12 and 16 James II.; 2 James III.; and 104 James V., c. 7.

It arose from the depredations of James Hodgeson, a poacher, who, in defiance of the law, had been in the practice of entering on the appellant's grounds, hunting with guns, and dogs, and nets, at all seasons, in violation of the laws for preservation of the game, and the Act of Queen Anne, 1707, c. 13.

It was stated by the appellant, that in these practices he was countenanced by the respondents, justices of the peace for the county of Lanark, whom the poacher supplied with plenty of wild fowl and game.

His Grace further stated, that when Hodgeson was apprehended and sent to prison, to stand trial for these offences, he was allowed his liberty on entering into recognizance to appear and stand trial upon any complaint that should be brought against him. By another warrant of the magistrates of Lanark, his dogs and nets were put into the keeping of persons appointed for that purpose.

The appellant being advised to carry on the prosecution; this was done before the sheriff of the county, with concourse of the procurator-fiscal, concluding for the several penalties by the above-mentioned statutes, and more particularly for the forfeiture of the dogs and nets, against Hodgeson.

His Grace further stated that the respondents, unknown to him, entered into a scheme in order to frustrate this prosecution.

They, it turned out, had held some private meeting, within the county, and professing to meet in the character of justices of peace, to take cognizance of the offence against Hodgeson, and without any complaint from the appellant, or without his being present, they proceeded *de plano* to judgment, James Hodgeson being then present before them. Upon Hodgeson confessing that he did hunt with net and dogs, but denied that he killed or destroyed any of the game, the justices accepted of this confession, and found him liable to pay a penalty of 20s.

In moving, therefore, in the prosecution before the sheriff, the appellant was met with the objection, that Hodgeson had been already tried, convicted and punished for the offence, by the justices. The sheriff sustained this defence, but the appellant, satisfied that the whole proceedings bore the evident marks of collusion, brought an advocation of this sentence to the Court of Session. In the meantime, Hodgeson made his escape; and the appellant brought an action before the Court of Session, against the respondents, founded on the Acts above-mentioned, for misbehaving in their offices as judges, and being wilfully guilty of partial administration of justice.

In defence, the respondents pleaded the statute 24 Geo. II., c. 44, in bar of this action, entituled "an Act for render-"ing justices of the peace more safe in the execution of their

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" office." This Act provides for the parties giving notice to the justices of the intended claim, so that just amends may be made. It also provides that no action will be competent, " unless commenced within six calendar months after the act committed."

The summons bore date 10th January 1752, and was executed on the 20th of the same month, so that the summons was raised within the six months.

It was in answer to this defence stated by the appellant, that the Act in question was by every clause thereof obviously meant to be limited to England, and could by no just construction be extended to Scotland. It was replied for the respondents, that this being a *British statute*, and containing no clause limiting the same, it must be understood to reach all parts of the United Kingdom.

July 28, 1752. The Lord Ordinary pronounced this interlocutor:- " Having considered the foregoing debate, and Act of Pa " liament founded on for the defenders, the justices of the peace, " and having advised with the Lords thereanent: Finds that " the said Act does extend to Scotland." On reclaiming Dec. 19, 1752. petition, the Court " find that the Act of Parliament founded " on extends to Scotland, and that the case falls under the said " Act of Parliament; but find no costs due." On reclaiming Feb. 6, 1753. petition, the Court altered and found " That the Act of Par- " liament founded on does not extend to Scotland, and " remitted to the Lord Ordinary to proceed." But on further July 20, 1753. petition, the Court varied their last interlocutor, and " ad- " hered to the interlocutor of 19th December last, finding " that the Act of Parliament founded on, extends to Scot- " land, and that this case falls under the said Act of Par- Dec. 18, 1753. " liament." And to this interlocutor they afterwards adhered.

Against these interlocutors, the present appeal was brought by the appellant; the cross-appeal had reference to the costs.

After hearing counsel,

It was ordered and adjudged that the said interlocutors complained of in the orginal appeal be reversed, and the interlocutor of 6th February 1753, whereby the said Lords of Session found that the Act of Parliament founded on, does not extend to Scotland, and remitted to the Lord Ordinary to proceed accordingly, be affirmed. And it be further ordered that the cross-appeal be dismissed.

For the Appellant, *W. Murray, And. Bringloe.*

For the Respondents, *A. Hume Campbell, Gilbert Elliot.*

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NOTE.—Lord Elchies has the following note on this case:—"The first question was, Whether the Act 44 Geo. II., extended to Scotland? The President thought it did as to the prescription or limitation of actions against justices, but not as to the manner of trial, which, by that Act, can only be by juries. Others, again, thought it impossible to separate the clauses of that Act; and as the limitation extended to Scotland, so must the whole Act, and as it was impossible that the legislature could intend such an alteration of our law, which would confine all complaints against justices of the peace to the Court of Justiciary, they thought that none of it extended. But, upon the question, it carried that it does extend to Scotland." "But, 6th February 1753, found that the Act does not extend to Scotland, and so also now thought the President." "On further reclaiming, they changed their opinion again." *Vide* Elchies, Vol. ii., p. 234.

HIS MAJESTY'S ADVOCATE, . . *Appellant;*

SIR LEWIS MACKENZIE, . . . *Respondent.*

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House of Lords, 25th March 1756.

HIS MAJESTY'S ADVOCATE v. MACKENZIE.

OBLIGATION—DEBT—INTEREST.—A claim of debt was made on the forfeited estate of Cromarty, on an obligation dated in 1705, upon which adjudication against the estate had followed in 1722, for the accumulated sum in the adjudication, and interest. Held the claimant entitled to the accumulated sum, and the annual rents due thereon, from the date of the adjudication. Reversed in the House of Lords.

George, first Earl of Cromarty, granted a written obligation to Sir Kenneth Mackenzie, the respondent's grandfather, whereby he "acknowledged to be indebted to the latter in "2500 merks, or 2300 merks, I know not whether." This document was dated 26th March 1705. The Earl returned to Scotland in the following summer; but though the Earl lived for eleven years after its date, yet, during his life, and for seven years thereafter, no demand appeared to have been made.

His son, the second Earl, succeeded him.

In 1722, a decree of constitution against the second Earl,

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was obtained on this debt, upon which adjudication was led against his estate.

Upon Earl John's death, he was succeeded by his son, Earl George, who, being convicted and attainted of high treason, his estate was forfeited to the crown.

The respondent then produced his claim of debt and adjudication.

But the appellant, on behalf of his Majesty, objected to this claim, on the following grounds,—1st, That from the nature of the original obligation, and from the peculiar circumstances, no interest could accrue on this debt. 2d, If interest was due, it could only be for the original principal sum, but not on the new capital accumulated in the decreet of adjudication; for, by the vesting Act, "no decree could "be allowed on account of penalties;" and, as giving the creditor compound interest by an adjudication, was a statutory penalty, no decree could be made in the present case for such a penalty.

Mar. 17, 1753. The Lord Ordinary pronounced this interlocutor:—"Find "that the claimant is a just and lawful creditor on the estate, "real and personal, of the said George, late Earl of Cromarty, "and entitled to payment, furth thereof, of the said principal "sum of 2300 merks Scots money, and annual rents thereof, "from and since the 26th March 1705, and in time coming "until payment, and also to the expenses paid out by him "and his predecessors, preceding the forfeiture, in deducing "his adjudication; and decerns and declares accordingly."

July 10, 1753. On reclaiming petition, the Court adhered. On further reclaiming petition from the respondent, the Court altered so

Mar. 9, 1754. far as to "sustain the petitioner's claim for the accumulated "sum and annual rents thereof, from the *date* of the *adjudi-* "*cation*, and decerned accordingly."

Against these interlocutors the appellant brought the present appeal to the House of Lords, contending, that by the vesting Acts, the respondent was barred from the benefit of penalties for failure of payment or for any other penalties whatsoever, against the Crown, and therefore excluded from the interest of his accumulated sum.

After hearing counsel,

It was ordered and adjudged, that the said interlocutor of the 9th March 1754, complained of be, and the same is hereby reversed; and that the interlocutor of the

Lord Ordinary of the 7th March 1753, and the said interlocutor of the Lords of Session of the 10th July following, adhering thereto, be, and the same are hereby affirmed.

For the Appellant, *W. Murray, R. Dundas.*

For the Respondent, *A. Forrester, Geo. Brown.*

NOTE.—Unreported in the Court of Session.

JOHN STEWART, Esq., . . . *Appellant;*

Sir KENNETH MACKENZIE, Bart., . . *Respondent.*

House of Lords, 20th December 1757.

ENTAIL—DEBTS—PROVISIONS.—(1) An entailed estate having been sold under an Act of Parliament, and this Act having been obtained by the fraudulent allegation of debt, which did not exist, the sale was set aside, and the entail held to be still a binding and subsisting entail, though the maker and the institute had concurred to put an end to it, before the Act had been obtained. (2) Held that two of the debts founded on were not true debts; but that Lady Anne's bond of provision was a true debt, yet that no interest was chargeable against the estate on it, during Lord Royston's possession, as during that possession he was bound to keep down the interest of the debt on the estate.

This is the sequel of the case reported in vol. i., p. 578.

The cause having returned to the Court of Session, an account was ordered to be taken. The appellant, besides the allowances out of the money arising from the sale of the estate, for the expenses of passing the Act, and for a small part of the estate not comprised in the entail, claimed the following:—

1st, For the amount of Lady Anne and Lundine's debts, as accumulated by adjudication, and stated in the Act of Parliament at 51,350 merks Scots, with arrears of interest, and, 2d, For £800 as four years' rent of the estate with which Sir James Mackenzie had power, by the entail, to charge the same, for provisions to younger children.

To these claims the respondent objected, 1st, As to Lundine's debt, that it could be no charge on the entailed estate, the security having been granted eighteen years after the

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granter was divested of the fee; and that from a defeazance produced in Court, granted by Sir James to his father, the Earl, it appeared that bonds and other securities, to a large amount, had been assigned by the Earl to Sir James, in trust, among others, to pay the interest and a part of the principal money due to Lundine.

With respect to Lady Anne's bond of provision, the entail had expressly provided, that the interest thereof should become chargeable on the estate, only from the day of the Earl and Countess of Cromarty's death, and no interest could afterwards accrue, as Sir James then became the creditor, by the above-mentioned assignment, and was in the perception of the rents and profits, or otherwise bound by law to keep down the growing interest during his own lifetime.

2d, With respect to the £800 provision bond, as the power given to Sir James of charging the estate with provisions for younger children, had never been executed, no allowance could be made in respect thereof; and the fact was, Sir James had, in his own time, paid all his younger children's fortunes, and taken their discharges.

3d, It was, besides, contended that the maker of the entail and institute, before the Act of Parliament was obtained, had both concurred in putting an end to the entail 1688, so as to leave in Lord Cromarty the estate in fee simple.

June 25, 1756. The Court pronounced this interlocutor:—"Find that it "is competent for the defender to object that the estate of "Royston, did not remain entailed at the date of the Act of "Parliament authorizing the sale thereof, notwithstanding "of that Act; but find that the tailzie made by the disposi- "tion and charter 1688, was and is a subsisting tailzie." On reclaiming petition for the respondent, this interlocutor

Feb. 16, 1757. was pronounced:—"Find that it was not competent for the "defender to object that the estate of Royston did not re- "main entailed at the date of the Act of Parliament author- "izing the sale thereof." And also having considered the petition for the appellant, with the answer, and additional

Feb. 11, 1757. answer for the respondent, "they adhere to their former "interlocutor, and refuse the desire of the petition."

The Lord Ordinary having afterwards reported the other

Feb. 23, 1757. points in the cause, the Lords, by interlocutor of this date, "Find that neither the debt due to Humphrey Lundine, "nor the £800 sterling, said to be paid by Lord Royston, "for provisions to his daughters, are true debts affecting the "estate of Royston; but find that the principal sum of

" 20,000 merks contained in Lady Anne Mackenzie's bond, " is a debt affecting the said estate, but that the annual rents " thereof, either before Lord Cromarty's death, or after, " during Lord Royston's possession, are not a charge on the " same; and remit to the Lord Ordinary, to proceed ac- " cordingly."

March 5, 1757.

The appellant reclaimed against this interlocutor, but the Court, without troubling the respondent to answer, " unani- " mously adhered to their former interlocutor, and refused " the desire of the petitioner."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, As to the settlement 1688. This deed was manifestly calculated for a temporary purpose, and was never intended as a permanent settlement of the estate of Royston. There could be no views of establishing a family in the person of a third son, then an infant, as the value of the estate allotted to him as a patrimony, did not at that time exceed £3000 sterling, subject to his father's liferent, and a provision to his sister, equal to a third of the value. Accordingly, this settlement was never made effectual or recorded in the register of tailzies, in terms of the Act 1685. The maker of the entail continued in possession of the estate, and as soon as his son came of age, they jointly concurred in every deed which could render this entail of no effect.

2d, By the established law of Scotland, if the institute or first heir repudiate the entail, the substitutes (who can have no title but by service, as heir to him), of course cannot take the estate, and the entail is at an end; and even where the institute has taken the estate under the entail, it is still in the power of the maker of the settlement and the institute, by their joint concurrence to a deed, to vacate the entail, or to relax the prohibitory, irritant, and resolutive clauses thereof. In the present case, Sir James Mackenzie, the institute, far from accepting or approving of the settlement 1688, did, twelve years after, formally and legally renounce all right and title to the estate. On the faith of this renunciation, Lord Cromarty exercised all the powers of an absolute proprietor. He granted an heritable bond over the estate, to Humphrey Lundine, and soon after, by marriage articles, he provided the estate to his wife in liferent, and to the heirs-male of the marriage, in fee. These deeds afford incontestable proof that the entail was deemed legally vacated; and in

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confidence of this, Sir James Mackenzie did thereafter give up his right to an estate of equal value, and did take the estate of Royston, upon a new unlimited grant from his father, after which, they both concurred, in 1714, in a formal deed of revocation of the entail, 1688, and upon the unlimited title, Sir James Mackenzie possessed the estate till the year 1739.

3d, By the law and usage of Scotland, heirs of entail may lawfully take rights to the incumbrances affecting the estate tail, and keep these as separate estate, to be disposed of at pleasure, and to continue equally effectual against the estate tail, as if they had remained in the persons of the original creditors. In the present case, the debts for which the appellant claims allowance, out of the price of the estate of Royston, were such as, by the settlement, 1688, were made charges on the estate, or were really *bona fide* paid by Sir James Mackenzie. The whole does not exceed a very moderate provision, intended for the appellant's grandfather. Equity will, therefore, not suffer the words of a settlement to be rigorously strained to disappoint the appellant of his provision.

Pleaded for the Respondent.—1st, Sir James Mackenzie having, by repeated acts, testified his acceptance of the entail 1688, and in his petition to Parliament and otherwise, judicially admitted himself bound thereby, and the legislature, on his own information, having enacted that the residue of the price, after payment of debts, should be laid out to the uses of the entail; these circumstances are, in respect of him and all coming under him, conclusive, and must bar the appellant, his heir general, from disputing the validity of the entail. And as the question is not open, neither is it material, since, whether Sir James accepted or refused the entail, he could not prejudice the remainder men who claimed not through him. Their right was out of the reach of his refusal. His father, the Earl of Cromarty, was confined to a bare life estate; his own was, after the particular power of charging for younger children, limited by the strongest prohibitive, irritant, and resolutive clauses; it was therefore, no longer in his or his father's power, by any joint or separate act of theirs, to affect the remainder men.

2d, Lundine's debt is no charge upon the entailed estate; the infeftment was granted by a bare tenant for life, and determined with his liferent interest. If the debt remained still in Lundine's person, the question would not bear dispute;

and it is clearer, if possible, against an heir of tailzie, who would set up that debt to defeat the settlement under which he himself possessed.

3d, No interest on Lady Anne's bond is chargeable on the estate, but from the time it was made so by the entail, which makes it to commence at the Earl's death only.

4th, The power to charge for younger children given to Sir James, was optional and discretionary, whether he would or would not execute it. He did not execute it; nay, he does not appear to have ever taken one step towards executing it, unless it was by getting the whole purchase money into his own hands, and covenanting to lay out only £1000 to the old uses, which he never did. Here are no younger children unprovided for, nor any other ground of equity for the Court to interpose.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *C. Yorke, Alex. Wedderburn.*

For the Respondent, *Al. Forrester, Fred. Campbell.*

[Elchies, vol. ii., p. 159.]

Colonel JAMES ROSS of Balnagowan, . *Appellant;*

ALEXANDER ROSS of Pitcalny, and Others, *Respondents.*

House of Lords, 19th January 1758.

REDUCTION OF DEED—TITLE TO SUE—FRAUD AND INCAPACITY—PROOF—A reduction was brought of settlements on the head of fraud and incapacity. The appellant objected, that the respondent had no title to raise such action, and, therefore, that he ought not to be let into proof of the reasons of reduction. Held him entitled to a proof; proof allowed to both parties.

This was an action of reduction and improbation, brought by the respondent's father, a colateral relation of Ross of Balnagowan, and who, 123 years before, had, by settlement, the estate of Balnagowan limited to him under that settlement, on the ground that the subsequent settlements of 1685,

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1706, 1707, 1711, had been fraudulently obtained upon false suggestions from David Ross, who was a weak man, and incapable of managing his affairs.

It appeared that the estate had been acquired by General Ross, the appellant's ancestor, by advancing to David Ross £5500, being the amount of debts with which it was incumbered, whereby all the parties interested, sold and conveyed the said estate to General Ross and certain other descendants of the General's father, remainder to the respondent's father.

In these circumstances, the defence stated by the appellant was, that the settlement of 1615, under which alone the respondent could claim, had been altered by the three several dispositions of 1630, 1638, and 1647, the charter and infeftment of David Ross of Balnagowan in 1648, and the charter and infeftment of the last David Ross as heir in special to his father; that under these titles, the estate had been possessed for upwards of a century, and as thereby, on the failure of issue male of David Ross, the second, the estate of Balnagowan (supposing the deeds now impugned out of the question), would have reverted to Lord Robert Ross and his heirs and assignees, from whom the appellant acquired them. The respondent, therefore, had no title to carry on the action, and the Court ought not to let him into a proof of the reasons of reduction; that David Ross' weakness and incapacity was a mere fiction; that he had held many public offices, and had sat as a member of Parliament in the House of Commons.

Feb. 9, 1740.

The Lords pronounced this interlocutor: "Find the pursuer, Alexander Ross of Pitcalny, as heir male of the said "David Ross of Balnagowan, or as having right to the adjudication led against him, the said Alexander, as charged to "enter heir to the said deceased David Ross, by David Ross, "writer in Edinburgh, has no sufficient title to carry on this "process, in so far as concerned such lands or parts of the "estate of the said David Ross, to which the pursuer could "not succeed as heir male to him, and whereof the succession is devised to a different series of heirs. But find, that by "the charter produced, granted by the Bishop of Ross to the "said David Ross *in anno* 1667, the succession of the lands "and others therein contained, is devised to the said David "Ross his heirs male; and, therefore, sustain the pursuer's "title, in so far as concerns those lands, and repelled the "defence of prescription. But, find that the qualifications of

" fraud and circumvention, and particularly of the facility and " weakness of the said David Ross of Balnagowan conde- " scended upon by the pursuer, are not sufficient for allow- " ing him proof even before answer of the said qualifications " after so great a distance of time, and after the death of " the said David Ross of Balnagowan, and of all the other " parties concerned in the transactions, now quarrelled; and " remit to Lord Dun, Ordinary in the cause, to proceed ac- " cordingly."

On reclaiming petition, the Court adhered, the respondent acquiescing in the first part of the interlocutor; and the respondent's father having died, the action went on in his name. Feb. 22, 1740.

The cause then went back to the Lord Ordinary, who ordered condescendence and answers, and when these were given in, the Lord Ordinary pronounced this interlocutor: " Makes avizandum with the condescendence, informations, " additional condescendence and answers given in for either " party to the Lords, grants diligence at the pursuer's in- " stance against havers, for recovering such further rights " and titles to the estate of *Balnagowan* or any part thereof, " which are devised to heirs male whatever, to be reported the " first sederunt day." Feb. 27, 1756.

Under this report to the Court, the following interlocutor was pronounced: " The Lords, before answer, allow the pur- " suer, Alexander Ross of Pitcalny, to prove his reasons of " reduction, and all facts and circumstances which may be " material for him in the cause, and allow the defender, " Colonel James Ross, to prove his defence, all facts and cir- " cumstances, which may be material for him in the cause, " and allow both parties a conjunct probation all *prout de* " *jure*." July 29, 1756.

On reclaiming petition the Court adhered. Aug. 11, 1756.

Against these interlocutors the present appeal was brought to the House of Lords

Pleaded for the Appellant.—It is an established rule in the laws of Scotland as well as in common sense, that a plaintiff seeking relief against a settlement for fraud or any other reason, must show a title in himself, in case that settlement was out of the way. If he fails in this, he is stopped *in limine*, since a plaintiff's saying you have no title, *ergo* I have, is a *non sequitur*, and the letting him into a proof of facts and circumstances, would be but unnecessarily vexing the defendant (appellant), in a question where the plaintiff has no concern.

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ROSS v. ROSS, &c.

Pleaded for the Respondents.—The interlocutors complained of are warranted, not only by the substantial rules of justice, but by the common forms of the Court. It would be repugnant to the ends for which courts are instituted, and to constant experience, if process for producing deeds, or for making proofs, were refused *in limine* to a plaintiff, whose case is properly alleged in point of law; and if the facts be properly alleged, so as to bear legal relevancy on the face of them, the regular practice of the Court warrants the sending parties to proof before answer, because judgment of the Court can be governed only by the facts proved.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Al. Forrester, Alex. Wedderburn.*

For the Respondents, *C. Yorke, Fred. Campbell.*

NOTE.—Lord Elchies has this note in regard to this case:—"The Lords found qualifications condescended on not sufficient, and, therefore, remitted to the Ordinary to hear further. I own I had a good deal of difficulty in the case. I thought much would depend on the last Balnagowan's capacity or degree of his weakness; and as no challenge was brought for nearly thirty years after his death, I thought it dangerous to allow a vague proof at large of his weakness, without condescending on some particular instances of his weakness, and, therefore, voted for the interlocutor."—*Vide* Elchies, vol. ii., p. 159.

1758.

MILLER v. ALEXANDER.

JOHN MILLER of Greenock, Tobacconist, *Appellant;*

WM. ALEXANDER, Merchant, Edinburgh, Agent for the Farmers' General in France, *Respondent.*

House of Lords, 19th April 1758.

DAMAGES FOR FRAUDULENT ABSTRACTION. — Circumstances in which the respondent was held liable to damages for abstraction of tobacco.

The appellant was in the habit of importing tobacco from America, and reselling it again for exportation to France;

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MILLER v. ALEXANDER.

and the present was an action of damages brought by the respondent, agent for the Farmers' General in France against him, charging him with fraudulently abstracting from the hogsheads as they arrived from America, a great part of the tobacco purchased by the respondent's constituents, and substituting in place thereof, tobaccoes of inferior quality, called *boæ and babby tobaccoes*. On proof the respondent made out his allegations, and the Court found the appellant liable to the pursuer (respondent) as factor foresaid, in damages, and remitted to the Lord Ordinary to ascertain the amount. The Lord Ordinary found him liable in £1643, 1s. 4d., as the total loss sustained upon the cargoes of tobacco therein mentioned, and to this the Court adhered.

Aug. 10, 1756.

Dec. 14, 1756.

Dec. 2, 1757.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, affirmed.

For the Appellant, *C. Yorke, John Dalrymple.*

For the Respondent, *Rob. Dundas, Al. Forrester.*

NOTE.—Unreported in the Court of Session.

1759.

SCOTT, &c. v. COCHRAN, &c.

THOMAS SCOTT and JAMES YOUNG of Netherfield, Esq., ... *Appellants;*

JAMES COCHRAN and JANET, his wife, . *Respondents.*

House of Lords, 18th January 1759.

DEFECTIVE LEASE—POSSESSION—REDUCTION—DEED—SUBSCRIPTION—SERVICE.—(1) A translation of a lease held not to be reducible under the Act 1696, although it was only signed by the granter on the last page, possession on the lease having followed. (2) Also held it no objection to sue an action of reduction of this lease, that the pursuer had not produced a service as heir, that being unnecessary.

By tack executed between James Young of Netherfield, and James Lawson, James Young for the yearly rent of £11, 2s. 2d., and other covenants therein mentioned, let to

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SCOTT, &c. v. COCHRAN, &c.

James Lawson, his heirs and assigns, the farm of Midlin Bank, for the term of three nineteen years from Martinmas 1703.

This lease was conveyed, of this date, 1st May 1719, by James Lawson to Mathew Lowdon, "*and failing of him by* "*decease* to James Lowdon, his lawful son, his heirs, execu- "tors or assigns."

Upon the death of his son in 1725, Mathew Lowdon, the father, who had only a right to the above lease during his life, conveyed the lease to James Baird, his nephew, by Marion, his half sister, in preference to Janet, his own sister of full blood, who, in terms of the original conveyance in 1719, had an undoubted right to the residue of the remaining terms of the lease.

Upon the death of James Baird, in 1743, the respondent, in right of Janet Baird, his wife, the only child of James Baird, succeeded to the lease, entered into possession by his subtenants and uplifted the rents.

The appellant, Thomas Scott, was the grandson of Janet Lowdon, sister to Mathew Lowdon, who conveyed the lease to James Baird. He came forward and objected to that conveyance as being beyond the power of Mathew Lowdon, he being limited to a liferent.

But fearing that there might be a further conveyance of the lease, and anxious to enter into some arrangement to prevent this, the landlord came forward and proposed to treat with the contending parties. For this purpose a meeting took place. It was at this meeting discovered that the conveyance of the lease by Mathew Lowdon to Baird was only signed on one page. It was then objected that it was null under the statute 1696, which enjoins that every page of the deed shall be signed by the party.

Two actions were thereupon instituted before the Court of Session in name of the appellant, Thomas Scott, as heir of the before mentioned Mathew and James Lowdon, against the respondents and against James and Archibald Dun, then subtenants, to whom they had let the said farm of Midlin Bank. One of these actions was to set aside the respondent's right to the said lease; and the other, an action of removing, against him and his subtenants.

These actions having been conjoined, the respondent exhibited the original lease, and objected that Thomas Scott had no right to sue, as he had not taken out a service as heir to Mathew and James Lowdon. In answer, it was stated,

that by the law and usage of Scotland, leases transmitted without service.

The Lord Ordinary pronounced this interlocutor: "Sustains the pursuer's (Scott's) title in the reduction, as heir to "Mathew Lowdon, and in regard the pursuer insists in an "improbation of the whole deeds, adhere to the former interlocutor, in so far as it finds that the defenders, the users "thereof, must abide by them *sub periculo falsi*, reserving to "the defenders, in case any of the subscriptions shall be found "a true subscription, to plead the import thereof as accords; "and ordains the defenders to appear against the third day "of July then next, to abide *sub periculo falsi*." June 21, 1751.

On representation, the Lord Ordinary pronounced this interlocutor: "Having considered that the defunct (*i.e.* "Mathew Lowdon), was not in possession of the tack at his "death, nor had been for some years before, sists process (*i.e.* "stays further proceedings) until the pursuer shall make up "a title to the tack by general service as heir to Mathew "Lowdon."

On reclaiming petition to the Court, the Lords, of this date, pronounced this interlocutor: "Find the pursuer (Scott) "can carry on this process without serving heir to any of his "predecessors, and that, therefore, he can propone improbation "against the translation to the tack produced; and remitted "to the Lord Ordinary to proceed accordingly." June 26, 1754.

The cause having then been debated before the Lord Ordinary, the respondent (Cochran) refused to appear in support of the deed challenged, but urged that the respondent, Janet, his wife, was grandchild of Marion Lowdon, who was sister-german to Mathew Lowdon, and consequently was equally entitled with the appellant, the grandson of the other sister, to a moiety of the lease.

The Lord Ordinary thereupon pronounced the following interlocutor: "Having considered the debate, and in respect "the defenders' procurator refused to take a day to produce "them, or to abide by the translation challenged, sustains the "reasons of reduction of the said deed, and reduces, decerns, "and declares accordingly; and, before answer to the other "defence, allows the defender (Janet) to prove *prout de jure*, "her propinquity to Marion Lowdon, and that the said "Marion was a sister of the full blood to Mathew Lowdon, and "allows the pursuer a conjunct probation thereanent if he "thinks fit." July 11, 1754.

On representation from the respondents, acknowledging that

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Marion Lowdon, the respondent, Janet's grandmother, was only half sister to Mathew Lowdon, and that the respondent had no title to the lease, as heir to Marion Lowdon; and praying that the former interlocutor might be recalled, and that they might be allowed to take a day to abide by the translation challenged; whereupon the Lord Ordinary ordained the respondent, James Cochran, to appear and abide by the verity of the deed challenged. This order having been complied with, the appellant, Thomas Scott, then gave in articles improbatory. The chief of which was, that the lease had, during the lifetime of Mathew Lowdon, been seen to have been subscribed on two pages, but that several persons had seen it several years after his death, with his subscription only on one page; and, therefore, the conveyance was forged and the deed void.

In answer, the respondents contended, that the challenge of forgery, and the above statements were entirely an invention of Mr Young of Netherfield, who was principally concerned in prosecuting this action. That it could be proved by the instrumentary witnesses then alive, that the conveyance was duly executed. That Mr Young was for some time possessed of the writings, and particularly of the conveyance under challenge. And that he had so prepared matters as to furnish a handle for the game he pursued, if it was true, that the conveyance wanted the subscription of Mathew Lowdon on one of the pages, which was the pretence for setting it aside. That, therefore, before any proof was allowed, Thomas Scott ought to declare by writing under his hand, "Whether he had entered into any written agreement "with Mr Young, or any person for his behoof, concerning "his right to the lease of Midlin Bank. And whether Mr "Young had not defrayed the expense of making up Scott's "titles, and of carrying on the action, and whether he had "not the sole direction thereof." He appeared by order of the Lord Ordinary, and declared negative of this.

A proof having been allowed, it was proved by James and William Young, who were present at the meeting, and who deponed, "that the whole writings relative to the foresaid "lease were then produced and shown by James Cochran, "and were read over, and that the assignment from Mathew "Lowdon at that time wanted his subscription on the first "page."

Feb. 17, 1756. The Lords pronounced this interlocutor: "Repel the "reasons of reduction, and assoilzie the defenders from the

" process of reduction, improbation, and of removing at Thomas " Scott's instance. Find expenses due, and find James Young " of Netherfield liable in payment of the said expenses, and " ordain an account thereof to be given in; and also recom- " mended to the lawyers for the Crown to inquire into the said " James Young's conduct in the proceedings in the said pro- " cess, and to prosecute him, if they should see cause, and " decern."

A further proof as to the subscription was allowed, from which it appeared, that when James Cochran produced the assignation of the lease from Lowdon to Baird at the said meeting, James Young then pointed out to Cochran, in the presence of the meeting, that it wanted the subscription of Lowdon on the first page thereof.

The Lords, of this date, pronounced this interlocutor: Dec. 7, 1757. " Adhere to their former interlocutor, of date the 17th " February 1756, in so far as it repels the reasons of reduc- " tion, and assoilzies the defenders from the process of re- " duction, improbation, and removing, at Thomas Scott's " instance: Find expenses due, and that James Young of " Netherfield is liable for the same; but find there is no " sufficient ground for the latter part of the said interlocutor, " recommending to the lawyers for the Crown to inquire into " the said James Young's conduct in this process, and to pro- " secute him, if they see cause, and therefore recall the " same."

The appellants reclaimed, and the Court pronounced this interlocutor: " Find it proven, that the subscription of Mathew Feb. 3, 1758. " Lowdon had been adhibited to the first page of the transla- " tion, after his death; but find it not proved that either of " the parties were accessory to adhibiting this subscription; " and therefore, and in respect it was not denied that the " subscription adhibited to the second and last page is a true " subscription, adhere to the former interlocutors, assoilzieing " the defenders from the process of reduction, improbation, " and removing, and recall the recommendation to the lawyers " for the Crown. But, in respect of Netherfield's conduct in " the proceedings in the said cause, adhere to the former inter- " locutors, finding him liable in expenses."

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors com-

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plained of be, and the same are hereby affirmed, with £100 costs.

For the Appellants, *C. Yorke, Al. Wedderburn.*

For the Respondents, *All. Forrester, Fred. Campbell.*

NOTE.—Unreported in the Court of Session.

1759.

MEARNS, &c. v. FARQUHARSON, &c.

[Mor., p. 2290; Kames' Sel. Dec., p. 142.]

Mrs MEARNS and Mrs GRANT (both Farquharsons, and their Husbands), . . *Appellants;*

JAMES FARQUHARSON, Esq., and Others, Trustees of James Farquharson of Inverey, deceased, for behoof of Alexander Farquharson, ... } *Respondents.*

House of Lords, 20th February 1759.

DESTINATION—GENERAL CLAUSE—SETTLEMENT.—A party executed a general conveyance of all lands and heritages that should happen to belong to him at his death. The estate of Auchlossen belonged to him at the time he executed this settlement. He afterwards succeeded to the estates of Inverey and Tulloch, which had belonged to his brother, and the question was, Whether the heirs whatsoever under the above settlement, had a right to the Inverey and Tulloch estates. Held that they had not. Affirmed.

Charles Farquharson, deceased, Writer to the Signet, executed a deed, of date 26th October 1721, whereby he conveyed, assigned, and disponed "to, and in favour of Patrick "Farquharson of Inverey (his elder brother), his heirs and "assigns whatsoever, all lands, heritages, tenements, annual "rents, debts, sums of money, heritable and moveable, &c., "that shall happen to pertain and belong to me at the time "of my decease." At the time of executing this deed, Charles Farquharson was seized of the lands and estate of Auchlossen, in the county of Aberdeen, of the yearly value of £200 sterling or thereabouts, which he had lately purchased, and likewise of a considerable personal estate.

Patrick Farquharson, his brother, the grantee in the above deed, was then seized of the lands and estates of *Inverey* and *Tulloch*, in the county of Aberdeen, the ancient inheritance of the family, which having for ages been limited by the in-

vestitures thereof to heirs male, were, by his marriage articles with Elizabeth Black, his second wife, executed, with the consent of the said Charles Farquharson, settled upon the heirs male of that marriage; remainder to the heirs male of Patrick Farquharson's body of any other marriage; remainder *to his other nearest heirs male.* And by a procuratory of resignation and deed, executed by Patrick Farquharson upon his buying in some adjudication affecting the estate of Tulloch, in 1724 these lands were again settled upon the heirs male lawfully procreated, or to be procreated, of Patrick Farquharson's body; remainder *to his heirs male whatsoever.* And Charles Farquharson framed, and was witness to, the execution of this deed, whereupon charter and infeftment duly passed. Oct. 22, 1714.

Patrick Farquharson had issue of his first marriage four daughters; and of his second marriage, two sons and two daughters.

Upon his death, Joseph, his eldest son, was served heir male to him, and was duly infeft in the lands of Tulloch, but died before completing his title to the lands of Inverey. Benjamin, his brother, was served heir male to his father and brother, and duly infeft in both estates; but he also dying in December 1738, the said Charles Farquharson, his uncle, and granter of the deed 1721, succeeded to both these estates, and completed his title by service as heir male to the said Benjamin Farquharson, and upon warrants from the superiors, was duly infeft. Mar. 30, 1737.

The family inheritance thus descending in the male line, Charles Farquharson thought proper, immediately upon its devolving upon him, to settle his other estate of Auchlossen, which was his own purchase, in the same way, and accordingly, of this date, resigned it into the hands of the superiors for new infeftments to himself and the heirs male to be procreated of his own body; remainder to his *other heirs male,* thereby excluding his own daughters and heirs female. And all other deeds, after this date, proceeded upon this plan and intent, of heirs male succeeding in both estates. Feb. 18, 1739.

In particular, a deed was executed on 16th October 1739, limiting the estate of Inverey to heirs male; and the widow of Patrick having received satisfaction of her claims and demands out of her husband's estate, executed a discharge, discharging Charles Farquharson, apparent heir male of the estate of Inverey. Oct. 1739.

Charles Farquharson, of this date, executed a bond of pro- Aug. 18, 1744.

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vision in favour of Charles Farquharson, his natural son, *which failing, to return or to remain with the granter's nearest heirs succeeding to him in his lands and estate by succession or destination.* Another bond of provision was granted in favour of the said natural son, provided that, in case this sum should be gratuitously assigned by his said son, and paid before his full age of twenty-one, then the *same should be repaid to the granter's heirs for the time being succeeding to him in his lands and his estate.* He died, and was succeeded by James Farquharson, the heir-male.

In these circumstances, the present action was brought by the appellants, two of the surviving daughters of Patrick Farquharson, for declaring their right to the estates of Inverey and Tulloch, by virtue of their uncle, Charles Farquharson's deed of 26th October 1721, and concluding that James Farquharson should denude himself thereof, in their favour.

The appellants contended that the intent of Charles Farquharson's deed in 1721, was to convey every kind of estate which belonged to him at his death, as effectually as if each particular had been enumerated; that the lands of Inverey and Tulloch having come to him in fee simple, and he, as a man of business, well apprised of the import of his deed, having never thought fit to alter it, there can be no doubt as to his intention;—that the circumstances alleged by the defendants were by no means sufficient to establish a presumption of Charles Farquharson's meaning, to except the lands of Inverey and Tulloch from his general settlement; and as that settlement was not simply in favour of *Patrick*, but likewise of his heirs whatsoever, it could not be annulled by Patrick's dying in Charles' lifetime, and therefore the appellants, under the character of heirs whatsoever, were undoubtedly entitled to take their shares of Inverey and Tulloch under this deed, which did not require delivery to make it effectual, that solemnity being expressly dispensed with by the granter.

In answer, the defenders contended, that this general deed made in 1721, could not possibly comprehend the estates of Inverey and Tulloch, as nothing was more absurd, than for Charles to convey to Patrick what this last was then absolute owner of, and held by him and his sons for eighteen years thereafter;—that, if these estates could not have been granted *particularly*, neither could they be comprehended within the *general* description in the deed;—that the granter being at this time so infirm and valetudinary, that his life was

despaired of, made the deed *intuitu mortis*, intending only to give his own estate and effects to his brother Patrick, who, dying before him, the deed was void; it being established by the law of Scotland, and by precedents of the greatest authority, that, in testamentary deeds where the donor survives the donee, the donation is lapsed and ineffectual;—that, even had Charles been actually possessed of these estates in 1721, such a general deed as this had not been sufficient to alter the general course of the family settlements, which all run in favour of heirs male; and much less could it vary them when the estates were actually in Patrick, and might probably never come to Charles;—that his own acts sufficiently denoted his intent, which was to add his new purchase to the family estate, for which reason he had settled it upon the heirs male, excluding even his own daughters, presently after his coming to this family estate; and he had, in a variety of other deeds, plainly showed his apprehension that Inverey and Tulloch stood limited to heirs male.

The Lord Ordinary repelled the defences pleaded for the defenders, and decerned. On representation, with answers, he adhered. Dec. 21, 1752. Feb. 23, 1753.

The respondents reclaimed to the Court, and the Lords were pleased to pronounce this interlocutor: "Find no action "competent to the pursuers in virtue of the deed 1721, "against the defenders, to oblige them to denude of the "estates of Inverey and Tulloch, and therefore assoilzie and "decern." Feb. 11, 1756.

The appellants then also petitioned the Court, specially craving to explain the above interlocutor, by giving special judgment upon the several defences pleaded; whereupon the Lords, of this date, pronounced the following interlocutor: March 2, 1756. "Repel the objections to the titles made up by Charles, Joseph, "and Benjamin Farquharson, to the lands of Inverey and "Tulloch, and adhere to their former interlocutor, finding no "action competent to the pursuers in virtue of the deed "1721, against the defenders, to oblige them to denude of "the estates of Inverey and Tulloch."

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same is, hereby affirmed.

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MEARNS, &c. v. FARQUHARSON, &c.

For the Appellants, *C. Yorke, Fred. Campbell.*

For the Respondents, *R. Dundas, Al. Forrester.*

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SINCLAIR, &c. v. THE EARL OF BREADALBANE, &c.

FRANCIS SINCLAIR, Esq., Brother of the Right Hon. Alexander, Earl of Caithness, and HIS MAJESTY'S ADVOCATE for Scotland, ... } *Appellants;*

EARL OF BREADALBANE, SIR WM. DUNBAR, SIR WM. SINCLAIR, and GEORGE SINCLAIR of Ulbster, Esq., . . . } *Respondents.*

House of Lords, 22d February 1759.

PRESCRIPTION—NEGATIVE AND POSITIVE.—A conveyance by the Earl of Caithness, of his estates, reserving to himself power to redeem within six years, and to the heir male of his body at any time, to be irredeemable after that period;—Held that the long prescriptive possession, for more than forty years after the expiry of the six years, and failure of issue male, was a sufficient title to exclude.

George, Earl of Caithness, executed a disposition in 1672, and conveyance of the estate and Earldom of Caithness, with the heritable jurisdictions and titles of honour, in favour of John Campbell, Esq. of Glenorchy (afterwards Earl of Breadalbane), upon the narrative "that he had advanced, "paid, and delivered to his Lordship, and his creditors, in "his name and by his direction, certain great sums." The lands, &c., were made redeemable within six years, but declaring, if not redeemed from the said John Campbell, "that the foresaid lands, living, and estate, title, and honour "and dignity, shall fall, accresce, and pertain to the said "John Campbell, and his foresaids, heritably and irredeem-"ably for ever," in which case, John Campbell was taken bound to "wear and use the surname of Sinclair, and arms "of our house of Caithness." There was a separate letter, granted by Campbell, binding himself to give redemption of the lands. A charter under the great seal was obtained upon this disposition, and he was infeft, but the clause of reversion before recited did not appear in the subsequent infeftments; and possession followed, although this had been disturbed in some measure by the lawless attempts of the appellant's family to regain their estate.

Jan. 31, 1673.
Feb. 27, 1673.

In 1720, the present action of reduction, and improbation, was thereupon brought by the appellants to set aside the respondents' right to the said lands, and, in particular, the foresaid disposition of 1672, setting forth that none of the respondents had possessed the said lands and estate peaceably, without interruption, for the space of forty years; that the said Alexander, Earl of Caithness, or his predecessors, had, by processes and other legal means, interrupted the respondents' right of prescription; that, at any rate, the said Earl of Breadalbane, or his predecessors, had the foresaid lands and estate only under redemption, and that there was a clause of redemption in the body of the deed itself, and there was also a separate letter of redemption in reference to this deed, drawn out at the same time.

In defence, the respondents pleaded a right of prescription to the lands and estate in question, which they alleged they had possessed above forty years, without any interruption; and, having insisted that the title deeds and writings relative to the estate, had been delivered to the Earl of Breadalbane, in consequence of his right by the disposition 1672, a proof was thereupon allowed and taken, 1st, With respect to the respondents and their predecessors' possession of the estate of *Caithness* and others during the years of prescription; and, 2dly, With respect to the Earl of Breadalbane's having access to the charter chest and writings of the family of Caithness, immediately after the death of George, first Earl of Caithness, and his carrying off and possessing the same since that time.

With respect to the possession of the estate of Caithness, and other lands claimed by the appellants, it appeared from the testimony of several witnesses, and from the proceedings before the Parliament and Privy Council, that George, first Earl of Caithness, died at Thurso East, in May 1676. That in the year 1677, George, second Earl of Caithness, attained possession of his paternal estate of Keiss, Tister, and Northfield. That in the year 1679, he took possession of the estate and earldom of Caithness by force of arms, but was dispossessed thereof in 1680 by the Earl of Breadalbane, also by force of arms; and that the said George, Earl of Caithness, was restored by act of Privy Council, to the possession of his paternal estate before mentioned, in 1686, and continued to possess the same till his death in 1698, when the Earl of Breadalbane again seized the possession, and placed a body of men in the House of Keiss.

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Upon this state of the case Lord Minto, Ordinary, pronounced this interlocutor:—"Finds it proven that the Earl of "Caithness continued to possess the lands of Keiss, Tister, "and Northfield, until his death in the year 1698 or 1699; "and therefore repels the defence of an exclusive right by "prescription *quoad* these lands." On representation, the Lord Ordinary "repelled the defences pleaded for the de- "fender *in hoc statu* in respect of the answers. And finds "that the production made for him is not sufficient, without "the aid of the positive prescription to exclude the pursuers "*quoad* the lands of Keiss, How, Nibster, Tister, and North- "field, and therefore refuse the desire of the representation."

A third representation was given in, for the respondent, George Sinclair, against the foresaid interlocutors, in which he insisted that the disposition 1672, and charter and infeftment thereupon, were a sufficient title to exclude the appellant's claim; and answers having been put in to this repre-

June 23, 1747. sentation, the Lord Ordinary, of this date, was pleased to order informations.

Counsel having accordingly been heard on these; it was pleaded by the respondents, 1. That the disposition 1672, and charter and infeftment thereupon, afforded a title sufficient to exclude the appellant and all other persons claiming as heirs of George, Earl of Caithness, the granter of that disposition; that the estate was conveyed to the Earl of Breadalbane for an adequate value, as he was himself a very considerable creditor, and paid the debt due to Sir Robert Sinclair, and an annuity of £666, 13s. 4d. to the Earl and Countess of Caithness. That the Earl of Breadalbane had consented that the estate should be redeemable within the space of six years, as a favour to the Earl of Caithness, in case he should find a purchaser who would give a higher price or better conditions. That he had further consented that the estate should be at any time redeemable by the heirs male of the Earl of Caithness' body; but that no such redemption having been made within the space of six years, and the Earl having died without issue male, the deed of reversion was void and at an end, and the conveyance became absolute and irredeemable.

2. That the respondent's title was confirmed by the positive prescription established by the Act 1617, which declares that whosoever shall possess their lands and estate for forty years continually and together, shall never thereafter be troubled therein. That the respondents and their predecessors had

1759.

SINCLAIR, &c. v. THE EARL OF BREADALBANE, &c.

accordingly possessed the estate in question more than forty years from the date of the infeftment in February 1673, to the commencement of this action in 1720, no *lawful* interruption having been made during that space.

3. That the appellant's claim was now lost and expired, as it had not been prosecuted within the years of prescription established by the Act 1469. And in this case, more than forty years had elapsed, from the expiry of the redemption in 1678, and the appellant had moved no claim or taken any document on the deed of reversion.

Upon advising the cause, the Lord Ordinary pronounced this interlocutor: "Find the defenders (respondents) have "produced sufficient to exclude; and therefore assoilzie and "decern; superseding extract till the 8th of June then next." Feb. 21, 1751.

On reclaiming petition to the Court their Lordships unanimously adhered. Nov. 22, 1751.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellants, *C. Yorke, Al. Wedderburn.*

For the Respondents, *R. Dundas, Al. Forrester, Fred. Campbell.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. vol. ii., p. 216; et Mor. 2081.]

JOHN GRANT the Elder, and JOHN GRANT the Younger, ... *Appellants;*

THOMAS FORBES, ... *Respondent.*

1759.

GRANT, &c. v. FORBES.

House of Lords, 29th March 1759.

CAUTIONER—DAMAGES FOR OPPRESSIVE AND ILLEGAL EXECUTION OF DILIGENCE.—An action of damages was raised by the respondent for oppressive and illegal execution of a caption against him for debt, brought against the cautioner of the messenger and another, who was accessory to these proceedings. Held the appellants liable in £100 damages. Affirmed on appeal.

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GRANT, &C. v. FORBES.

James Grant having a debt and diligence against the respondent, put the diligence into the hands of Henderson, a messenger, to apprehend the respondent. The respondent was accordingly apprehended by Henderson at Fochabers, on the 16th September, and was carried away, attended by Grant, also his brothers and others.

From that date to the 27th of September, the respondent stated, that though he often insisted on being carried to prison, yet both Henderson and the Grants refused, but continued carrying him from house to house, by solitary roads through the country, and by endangering his life, forced him to grant certain deeds or leases, upon which he was set at liberty, and the messenger thereupon left him.

John Grant the younger was the cautioner for the messenger, and was called in that capacity; and his father, as having been accessory to the proceedings by which the deeds were impetrated from him.

The present action was therefore raised against James and Donald Grant, John Henderson, and the appellants, John Grant, elder, and John Grant, younger, insisting for exhibition of the several deeds and writings he was thus compelled to execute while under confinement; and concluding that the same should be declared void and null. That James and Donald Grant, John Henderson, and the appellant John Grant, younger, who was surety and bail for the messenger, should be decreed jointly and severally, to pay to the respondent the sum of £500 in name of damages. That the other appellant, John Grant, elder, as accessory to the illegal and oppressive measures before mentioned, and approving and enforcing them as an arbiter, should likewise be decreed to pay the sum of £200. The bond of caution for the messenger bore to indemnify whatever damages may be sustained "through the negligent, fraudful, and informal execution of "the said messenger in the said office."

July 8, 1758.

The Lords pronounced this interlocutor: "Find it proven "that James Grant, in Greenton, Donald Grant, in Dalvey, "and John Henderson, messenger, are guilty of the several "acts of oppression specified in the complaint; and therefore "find them, and John Grant, younger, of Rothmaise, cau- "tioner for the said John Henderson, messenger, conjunctly "and severally, liable to the complainer in damages, which "they modify to one hundred pounds sterling, and in the "expense of process, of which they ordain an account to "be given in. But find it not proven that Grant, elder, of

" Rothmaise, and George Meston, Tolmads, were accessory " to the acts of oppression charged in the complaint, and " therefore assoilzie them, and decern and declare accord- " ingly." On reclaiming petition the Court adhered. A subsequent interlocutor was pronounced as to the expenses. Jan. 5, 1759.

Against these interlocutors an appeal was brought in regard to the case of John Grant, the elder, and John Grant, the younger, cautioner for Henderson, the messenger.

Pleaded for the Appellants.—The appellant, John Grant, the elder, though he knew of Mr Forbes being a prisoner, yet was altogether ignorant that the application to him was the effect of force upon Forbes, if, indeed, there was any force used against him to bring about the application. Forbes' letter to him removed all doubts that could possibly arise in his mind; he avoided interfering at first, and was persuaded into it by Macpherson; he was the friend of Forbes, and not of the Grants. In this state of matters, the transaction he brought about by his mediation appeared to him the most expedient for getting Forbes out of the hands of the Grants.

2. With regard to the other appellant, the late Lord Lyon's commission to Henderson was only conditional, provided the commission was registered within eight days.

3. The bond of surety is, that he shall " truly and honestly " exercise the office of messenger, and if he does to the con- " trary, whatever damages, &c., any of them shall happen to " sustain through the negligent, fraudful, and informal exe- " cution of the said messenger, in the said office, we bind and " oblige us conjunctly and severally, both cautioner and mes- " senger, to pay the same to the party interested and wronged," which clearly relates to the employers of the messenger in the execution of process, but not to those whom the messenger may insult or outrage in that execution. Such offences he must answer criminally, and the fine is imposed as a punishment for his misdemeanour, but the surety neither is, nor was ever meant to be, answerable for the consequences the messenger might draw upon himself by such offence; and this construction is enforced by several statutes relative to messengers, as well as by the nature of the office of messenger.

Pleaded for the Respondent.—It appears that the appellant, John Grant, elder, was closely connected with Henderson, the messenger, or bailiff, who was the chief instrument of the acts of oppression found proved by the interlocutor of the 8th July 1758, which, in this particular, is not appealed from.

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And, in all the oppressive proceedings complained of, he connived with the Grants, and committed manifest iniquity and injustice, in acting as arbiter in the transactions referred to.

2. The cautioner for the messenger, Henderson, who so illegally and oppressively executed the diligence against him is, by the terms of his bond, liable to indemnify the lieges for any damage or injury they may sustain in the unlawful execution of his office; and the party injured or wronged, not the employer merely, is entitled to such indemnification. The party who is injured has as good a claim against the surety of the messenger as the employer of the messenger has for any loss the latter may sustain through the negligent execution of the office.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellants, *Al. Forrester, John Dalrymple.*

For the Respondent, *Robt. Dundas, C. Yorke.*

[Fac. Coll., vol. iii., p. 181; et Mor. 9933.]

SIR DAVID CUNNINGHAM, Bart., . . *Appellant;*

1762.

CUNNINGHAM v. WARDROBE, &c.

WM. WARDROBE; Mr JOHN WARDEN; JAMES WADDEL; Mr JOHN SCOT; GEORGE WHITE; WILLIAM MEEK, and Others, Heritors and Inhabitants of the Parish of Whitburn, . . . } *Respondents.*

House of Lords, 20th December 1762.

CHURCH PATRONAGE—RIGHT TO PRESENT.—The parish of Livingstone, of which the appellant was patron, was large; and it occurred to some of the heritors and inhabitants, that a new church, and a division of the parish would be a desirable object. They subscribed funds to purchase lands, and to mortify the same for the support of a minister. The deed of foundation vested the management of these, and the election of the minister in the heritors and kirk-session of Whitburn, and excluding the patron therefrom. The parish was divided, and a new erection obtained under the name of the parish of Whitburn. The patron had given a qualified consent to this erection, reserving his own rights. In an action at the patron's instance, held that

he had no right to present the minister, or to the vacant stipends. Reversed in the House of Lords, and held him to have right to both.

At one time the appellant was sole patron of the parish of Livingstone, in the county of Linlithgow. At that time the parish was large, extending from about seven miles from east to west. The inhabitants of the west end were divided from the east by a river often impassable, while the parish church was at the east end.

It occurring to the inhabitants that it would be advantageous to the spiritual well-being of the parish if it were divided, they, in 1630, applied to the presbytery for that purpose, and they, in 1647, found it necessary that the parish should be divided, and declared, by an Act 1650, that the parish was a sufficient charge for two ministers; and they described limits and bounds for the new church and parish.

At last, in the year 1789, a number of heritors and inhabitants of the parish made a subscription for raising a fund sufficient for endowing a church and maintaining a minister, and for that purpose entered into a deed of mortification, whereby they mortified the sums subscribed, for a fixed annual provision for the minister.

This deed of mortification appointed certain heritors of the parish to be trustees and managers of the money subscribed, and declared that these trustees should continue their management until a legal erection of the said new parish, which was to be called Whitburn, and a kirk-session should be lawfully constituted, and after that erection, the management was to be in the hands of the heritors and kirk-session lawfully constituted.

This deed further declared, "That all the ministers of the "said parish shall be elected and called by the plurality of "the kirk-session, lawfully constituted as aforesaid, heritors "and liferenters, having real interest in the said parish;" and there was also a clause "excluding hereby all patrons "or other persons expressly whatsoever, from the power of "presenting or nominating any person whatsoever, to be "minister of the said parish; as also from the disposal of the "aforesaid stipend, or other parts of the produce of the afore-"said mortified funds in times of vacancies."

In 1731, an action was brought for disjoining the parish of Whitburn from that of Livingstone, and for erecting Whitburn into a new parish. The consent of Sir James Cunningham, as patron of the parish, was obtained, but under

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reservation of any right he might by law be found to have, either to vacant stipends, or to the rights of presentation as patron of the parish of Livingstone.

Decree of division of the parish, and new erection of the parish of Whitburn followed.

In two presentations to the new parish of Whitburn which followed, one to Mr Wardrobe, and another to Mr Porteous, Sir James Cunningham asserted his right to present those ministers, who happened to be the very persons chosen by the kirk-session and electors themselves, but against this, a protest was taken on their part, which led Sir James to bring the present action for the vacant stipends, and a declarator to have his right of patronage and presentation declared.

These actions being conjoined, the appellant contended, that being patron of the parish of Livingstone, the new erection of part of the parish could not deprive him of his right over any part; and the new parish must still be subject to his right of patronage, which had been so determined in the parish of Haddington, 18th November 1680. 2 Stair's Decisions, 1799.

Mor. p. 9901.

It was answered by the respondents, that the patron's right must either arise *ex collatione fundi, ex constructione Ædis, aut ex donatione ecclesiæ*, but neither the appellant nor his predecessor contributed to any of those, but the whole endowment arose by the bounty of voluntary subscribers, under whom the respondents now claim, who, having bought the ground, built the church and manse, and also purchased the lands for payment of the stipend, and the glebe for accommodating the minister, the right of presentation by the rules of law, ought to belong to them, and not to the appellant. That the original subscribers had a right to annex what qualities and conditions they thought fit to their donation, and they had expressly reserved the right of presenting the minister, which reservation must have effect according to their intention, and debar him from any claim as patron of the entire parish.

Upon report of Lord Minto, the Lords pronounced this interlocutor:—"Find that Sir David Cunningham, the "pursuer, has the right of patronage of the parish of Whit- "burn, and of presentation of a minister to the said parish; "and that he has also right to the administration of the rents "of the lands purchased for a stipend to the said minister, "during a vacancy, and decern."

Jan. 21, 1762.

On reclaiming petition, the Court pronounced this inter-

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locutor, by a great majority:—"Sustain the defences, and "assoilzie from the declarator; prefer the petitioners to the "right of administration of the rents of the lands purchased "for a stipend to the minister, during a vacancy, and de-"cern."

Against this interlocutor the present appeal was brought to the House of Lords.

It was ordered and adjudged that the interlocutor of 26th February 1762 complained of, be reversed: And it is further ordered and adjudged, that the interlocutor of the said Lords of Session of the 21st of January 1762, be affirmed.

For the Appellants, *C. Yorke, Thos. Miller.*

For the Respondents, *Al. Forrester, Al. Wedderburn.*

1763.

THOM, &c. v. DALRYMPLE, &c.

WM. THOM, Esq., Advocate in Aberdeen, claiming the office of Civilian in the King's College of Old Aberdeen; Dr JOHN CHALMERS, Principal; Mr ALEXANDER BURNETT, Sub-Principal, and Mr RODERICK MACLEOD, and Mr JOHN LESLIE, Regents of the said College; GEORGE BURNET, Esq., Rector, and Messrs THOMSON, ROBERTSON, SKENE, and BURNET, *Procuratores Nationum* of the University of Old Aberdeen, . . . } *Appellants;*

DAVID DALRYMPLE, Esq., claiming the office of Civilian; Mr JOHN GREGORY, Professor of Medicine; Mr THOMAS GORDON, Professor of Humanity; Mr THOMAS REID, Regent in the said College; Mr JOHN LUMSDEN, Professor of Divinity, and Mr GEORGE GORDON, Professor of Oriental Languages in the said University; GEORGE MIDDLETON, Esq., pretended Rector, and Messrs FORBES, MOSSMAN, GORDON, and WILSON, pretended *Procuratores Nationum* of the said University, ... } *Respondents.*

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House of Lords, 22d February 1763.

THOM, &c. v. DALRYMPLE, &c.

COLLEGE—ELECTION OF PROFESSOR—CASTING VOTE.—(1) Held, in the election of a Rector, &c., in King's College, Aberdeen, that the principal of the College was not entitled to a double or casting vote. (2) Held also in the election of a civilian of the College, that the respondent, Dalrymple, had the greatest number of votes, and that his election had been duly and regularly made. Affirmed on appeal.

The University of Old Aberdeen, was founded in 1494, by a bull from the Pope, at the request of King James IV., and by the advice of William Elphinstone, then Bishop of Aberdeen, who, and his successors, were, by the bull, appointed Chancellors of the University which was erected, with all the privileges and immunities of the Universities at Paris or Bononia. And the Chancellor, *with the Rector of the University*, called to their assistance, a competent number of doctors and students in the several faculties, and two of the King's Privy Council were appointed to make, from time to time, such laws as should be necessary.

King James the IVth, being a minor at the date of this foundation, confirmed it by a charter in 1498, after he came of age, granting to the University, *et in prefata Universitate incorporatis seu incorporandis*, all the privileges which the Kings of France had granted to the University of Paris, or which his Majesty's progenitors had granted to the Universities of St Andrew's or Glasgow, together with certain tythes additional to those granted by the Pope to Bishop Elphinstone, for the maintenance therein mentioned, and for other uses, with power to Bishop Elphinstone to fill up the places of those, and to divide and distribute the Donations to the University, as he should think fit.

In 1505, the bishop having, from his own and other contributions, raised a considerable fund for building and endowing a College within the University, by deed of the 7th September 1505, founded one, called by him *Collegium Sanctæ Mariæ in Nativitate infra Universitatem villæ veteris Aberdonen, in civitate ejusdem*, establishing it as a distinct body within the University, endowing it with certain revenues, subjecting it to certain rules, appointing thirty-six members who were to form the collegiate body, and conferring on the Rector of the University particular privileges and powers over certain members of the College, reserving to himself, during his life, the right of filling up vacancies, and of making

what alterations and additions he should think proper, but excluding his successors from all power of alteration. This foundation, with all its clauses and articles, were confirmed by the Pope's bull in 1506; but being, in after times, taken into the King's immediate protection, came to be called the King's College of Old Aberdeen.

In 1529, by a second deed of foundation, confirmed by the Pope, Bishop Elphinstone granted farther revenues to this College, enlarged the number of members to forty-two, whose functions were prescribed, salaries settled, and rules laid down for the government of the whole. Concerning the Principal, who was considered throughout as the head or chief member of the College, and in the exercise of his privileges and functions was made answerable only to the Chancellor of the University, the deed contains the following clauses: "*Ex* "*quibus* (*i.e.* of the forty-two members) imprimis erint qua- "tuor Doctores, primus, viz., Unus in Theologia, quem Prin- "cipalem appellari volumus, cui omnes in dicto Collegio, "obedire et obedentiam præstare, cum debitis honore et "reverentia teneantur, &c., cujus officium erit dictum Col- "legium regere et gubernare in honestate custodire, &c., "cæteris omnibus dicti Collegii præesse, et eosdem in moribus "et disciplinis instruere, Regentium Leturas visitare, et, se "opus sit, reformare, delinquentes quovis modo per se vel "per alium punire," &c.

In this foundation, the Rector of the University, it was stated, was the second officer, in point of dignity, mentioned in the bishop's foundation. Four more University officers, called *Procuratores Nationum*, were also mentioned.

By the Bishop's foundation, the Principal and Sub-Principal were empowered to appoint, from time to time, as many out of the six students of divinity, as should be necessary for assisting them in the education of young students of arts, the persons so appointed to be called the *Regents of Arts*, and to go out at the end of six years. But, in 1538, the Chancellor of the University obtained a Papal bull, allowing him to continue the regents longer if he pleased, whereby, those regents who, by usage, were settled to be three in number, came to continue for life, and have constantly voted in all elections of College members, for 100 years back.

By the Bishop's foundation, certain rules were laid down for electing and admitting the College members. The election of the Principal was appointed to be made *per Rectorum Universitatis, quatuor Procuratores Nationum, Doctores in juri-*

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bus Pontifici et civili, medicum, sub-principalem, Regentes Artium, Grammaticum, sex studentes in Theologia.

The elections of the Sub-Principal, professors of canon law, physic, and grammar, were appointed to be made in the same manner, as the students of divinity and arts, *per sub-principalem, regentes artium, grammaticum, canonestam civicum et medicum, nominentur, et per principalem admittuntur.* And the election and admission of a civilian (concerning which the present question arises), was "*per dictos Rectorem, Procura-*" *tores Nationem, Principalem, et sub-principalem, Canonis-*" *tam, Medicum et Grammaticum, nominentur sive elegantur,* " *et per cancellarium admittantur.*"

After settling the form of elections appointed by the foundation, the charter contains the following clause :—" *Volumus* " *autem ut in omnibus istis electionibus, Principalis dicti Col-*" *legii habeat vocem Nominativam seu electivam et conclusivam.*"

It also provided that each professor, on their admission, should take the following oath, viz., " Ego, A. B. tactis sacris " Evangeliis juramentum presto Corporali me omnem obedien-" tiam et reverentiam debitam Universitatis Cancellario, ejus-" dem Rectori, et Collegii hujus Principali exhibiturum," &c.

The founding of other colleges in this University having been prevented by the troubles at the Reformation, Bishop Elphinstone's is the only college therein erected; but three separate professorships have been added, viz., one of Divinity, one of Oriental languages, and one of Mathematics, which last was soon dropt, for want of a fund to support it. The professorship of divinity was founded in or about the year 1630, by the Synod of Aberdeen, and Bishop of Aberdeen, by whose deed of endowment and charter following thereupon, the Professor was appointed to teach within the University, but to be always named by the Synod.

The Professor of Oriental Languages was founded by patent from King William in 1695, declaring him a member of the University, and giving him the University privileges of teaching, conferring degrees, &c.

The funds, out of which the salaries of these latter Professors arose, had no connection with those belonging to the members of the College, each of those Professors managing and receiving his own salary; but the revenues of the College were collected by an officer appointed for that purpose, called *Procurator Collegii*, out of a common fund, settled by Bishop Elphinstone, and by that officer divided among the members, agreeably to the deed of foundation.

Before the appointment of the Professor of Divinity, the members of the old foundation were composed both of the University and College, there being no other members; but, after the appointment of new Professors upon a different foundation, a distinction was made between the University and the College. Though those later Professors were, by their appointments, become members of the University, and thereby entitled to the common University privileges of voting in the election of University officers, and of teaching, and residing within the University precincts, and the like, yet they could have no right to the special privilege of electing the members of Bishop Elphinstone's College, and far less to any part of the revenues settled upon them.

Accordingly, those Professors, from the time of their respective foundations, never pretended to more than the common University privileges, till at last they wormed themselves into voting at the elections of the College members.

The foundation laid down no particular method of electing the Rector, or any other University officer. But the usage had been for the members of the University and College together, to choose the Rector annually, and also to join in the choice of the *procuratores nationum;* but as to these, the time of the continuance has been various. From the foundation down to about 1634 (earlier than which there is no record of elections extant) they were probably chosen annually, being by the Bishop's foundation considered as constant University officers, and, like the Rector, eligible annually; but, since the year 1684, they have been chosen for forms' sake only *pro re nata*, and in order to fill up the vacancies of members in the College, though this irregularity was all along considered by several of the members as a direct departure from the founder's rules.

Present Case.

In the same year, 1759, Dr Catanach, the civilian of this College being in a bad state of health, the respondent, Mr Dalrymple, his Majesty's sheriff-depute for the county of Aberdeen, though residing almost constantly at Edinburgh, as an advocate at the bar of the Court of Session, formed the design of getting himself elected Civilian in case of Dr Catanach's death, being joined by the Professor of Divinity, and his friends. But the doctor returned from Bath to Aberdeen in 1760, much recovered. In case of an election of Civilian occurring, however, and much difference of opinion existing as to the mode of election, it was agreed that a reference should be made to counsel of certain points proper

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for their determination; and at the same time it was resolved, by the majority of all parties, to elect a Rector of the University, agreeably to the foundation, who should continue in office for a year, and with a Rector, the four officers called *procuratores nationum* to continue also for a year. This was preparatory to the election of Civilian, supposing a vacancy to occur, but before any such had actually occurred.

Accordingly, upon the 13th May 1760, a meeting was called to make choice of these University officers, when there were present ten members, being all who could claim votes, good or bad. The Principal proposed George Burnet, Esq., to be chosen Rector for a year, and Messrs Andrew Burnet, James Thomson, Francis Skene, and John Robertson, to be *Procuratores Nationum*, also for a year. The Professor of Divinity, after entering a protest against the elections being made at this juncture, on pretence of the Rector and *Procuratores* being unnecessary officers; and also another protest against the Principal's taking to himself a double vote, proposed George Middleton, Esq., to be elected Rector for a year, and Patrick Duff, David Dalrymple, Patrick Wilson, and Theodore Gordon, to be *Procuratores Nationum* also for a year. The votes of the electors being declared, stood thus,—five for the Rector and Procurators proposed by the Principal; and five for the Rector and Procurators proposed by the Professor of Divinity.

The votes being thus equal, it came to the Principal's casting vote or *vox conclusiva*, which he gave for the Rector proposed by him (having already given an original vote for him, which was counted in the five). These parties were accordingly declared duly elected, to continue for a year.

The custom being, that the persons elected officers of the University should take an oath *de fideli*, but without limitation to any particular time, this was delayed till the gentlemen chosen should have an opportunity of attending a College meeting.

Thus matters stood on 24th November 1760, when Dr Catanach, the Civilian, died; and a University meeting being held, on that day, to prepare an address of condolence on the death of his late Majesty, the Divinity Professor mentioned Dr Catanach's death, which had happened but a few hours before, and moved this meeting to adjourn to the 27th, in order then to fix a time for filling up the vacancy. The Principal objected to the Professor's motion, as precipitate and indecent, and urging that the appointment of meetings

for filling up vacancies within Bishop Elphinstone's College, being a matter not belonging to the University meeting, then convened for other business, but to the Principal, as head of the College, he stated that he would call a meeting in due time, whereof all parties should have notice, and then withdrew. But the Professor and his party made a pretended adjournment to the 27th, for fixing a day for the election of a Civilian.

At the meeting on the 27th, the Principal, insisted on his right, by the foundation and constant usage, to appoint the days and times for election meetings within the College, and he did accordingly then appoint the 9th December next ensuing, for the choice of a Civilian, that interval appearing to him a reasonable time for giving notice to all parties interested, wherein he was joined by four members, including Mr Burnet, elected Rector on the 13th May, and had the question been put, it must have been carried for the day appointed by the Principal, as he and the four members who joined him, were equal in number to the Professor and his party—who made but five—and the Principal's casting vote must have carried. But Mr Middleton appearing at the meeting, the divinity Professor and his friends insisted that he had been duly elected Rector on the 13th May, which conferred upon him all the powers known to pertain to the office. They then elected Messrs Theodore Gordon, Patrick Wilson, Charles Forbes, and Thomas Mossman (the two last being different persons from those they had pretended to elect on the 13th May), *Procuratores Nationum, in hunc effectum* to vote for the Civilian, and required the Principal to admit and swear in the said George Middleton, Rector, and the said Procuratores.

Thereupon, also, Mr Burnet required the Principal to admit him to his office of Rector, to which he was duly elected on the 13th of May, and Messrs John Robertson, Francis Skene, and James Thomson, three of the *Procuratores Nationum* duly elected by the majority of votes on the same day, being present, and declaring their willingness to accept the Principal, did admit and swear in the said George Burnet, Rector, and the said three *Procuratores Nationum*, but refused to admit or swear in the said George Middleton, as Rector, or the others as *Procuratores*, who pretended to be elected such, by the Professor and his party. The last were, however, sworn in by Patrick Duff, Commissary of Aberdeen (one of the pretended *Procuratores Nationum*, elected by the

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Professor on the 13th May), holding himself entitled so to do as surrogate of the Chancellor of the University.

Here the parties were brought to issue about their respective elections.

The Professor of Divinity contended that George Burnet's election of Rector on the 13th May, was void, on the ground of the subsequent death of Dr Catanach, one of the electors, for that *mortuo mandatore perit mandatum*, and his admission, and all acts done by him, must also be void and null; and then pretending to have a majority of his side, by the concurrence of four constituent members, with Mr Middleton, his supposed Rector, and his four *Procuratores Nationum*, adjourned the meeting to six o'clock of the evening of the same day, for the election of a Civilian.

On the other hand, the Principal objected to this election, and repeated his appointment as head of the College, of the 6th December, requiring all parties interested to meet on that day for the election.

Meanwhile, at the meeting at six o'clock in the afternoon of the 27th November, the Principal appeared, and after representing to the members the irregularity of this meeting, to which, he declared, he came only to prevent, as far as he could, any undue advantage being taken of his non-attendance, without acknowledging the authority by which the meeting was appointed, entered his protest, that his voting at this meeting should not prejudice the meeting for the election appointed by him for the 9th December, in which three constituent members, together with Mr Burnet, the Rector, and the *Procuratores Nationum* duly elected on the 13th May, adhered to him.

The Professor and his party, however, proceeded to the election. There voted for Mr Thom seven; for Mr Dalrymple, the respondent, ten.

Mr Dalrymple, thus supported by the Professor of Divinity, was declared duly elected, and they appointed him to be presented to the office of Civilian, but George Burnet, Esq., the other Rector, and those adhering to him, declared the appellant, Mr Thom, duly elected Civilian, and appointed him to be presented thereto.

On the 6th December, to which day the Professor of Divinity and his party adjourned, there was produced to the meeting, a letter of acceptance from the respondent, Mr Dalrymple, of the office of Civilian, and an act of admission from the Commissary of Aberdeen, which the meeting entered

on their journal; but neither the Principal nor any of the members who joined him, attended this meeting.

On the 9th December, the day appointed by the Principal for the election, all parties again appeared; the Principal and his friends insisting that the proceedings had by the Professor of Divinity and his party, on the 27th November, and 6th of December, together with the Commissary's admission of the respondent, Mr Dalrymple, were all void, and that Mr Dalrymple, being sheriff-depute of the county of Aberdeen, was incapable of holding the office of Civilian, those two offices being in their nature incompatible; and it was objected to the Professors of Divinity and Oriental Languages, that neither of them had right to vote in the office of constituent members of the College. Whereupon, the divinity Professor objected to Mr M'Leod and Mr Leslie's right of voting, regents not being appointed by the foundation to vote in the election of a Civilian. Then the Principal and his adherents re-elected the *Procuratores Nationum*, who had been chosen in May, and confirmed on the 27th November, under protest that the re-election of these officers should not prejudge their former election; and next they proceeded to the election of a Civilian. The votes of the members being declared, those for the appellant, Mr Thom, were the same as on the 27th November, that is to say seven good and lawful votes, and the Principal also declared his casting and conclusive vote for him. Those for the respondent, Mr Dalrymple, were also the same, except that three only of his *Procuratores Nationum* were present and voted. Thus, Mr Dalrymple's votes at this meeting were nine, of which three only were unexceptionable, or at the most five good, supposing for such those of the Professors of Divinity and Oriental Languages; the other four votes being of those elected Rector and *Procuratores* in the irregular manner above mentioned.

The Principal declared Mr Thom again elected Civilian by a majority of legal electors, and appointed a presentation to be made out to him. But the respondents resisted.

The appellant, Mr Thom, thereupon brought before the Court of Session a suspension of the respondent, Mr Dalrymple's admission, and he also with the concurrence of the other appellants, brought an action of reduction of Mr Dalrymple's pretended election and admission, and for establishing and confirming his own, praying to have it declared that neither of the Professors of Divinity or Oriental Languages, though members of the University, could be proper members

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of the College founded by Bishop Elphinstone, and were not entitled to vote in the choice of College members, nor entitled to any part of the revenues or funds belonging to the College; that the Principal of the College, in all elections of Professors, had a double vote; that the appellants had, respectively, been duly elected Rector, *Procuratores Nationum*, and Civilian.

Arguments of Parties.

The appellants insisted that the Rector, being chosen at such time of the year, as the members of the University think fit, to continue for a year, becomes entitled to vote in the election of the *Procuratores Nationum*, as well as in the election of Professors and Masters. That the four *Procuratores Nationum* were proper officers of the University also, being elected, at any convenient time, to continue in office for a year, and that they, by virtue of their election, became entitled to vote in all elections for supplying vacancies happening during that year. That in all elections and resolutions, whether in University or College meetings, the Principal presiding, is entitled to give one vote as a member, and also, in case of an equality, a conclusive or casting vote; and further, that the Principal has the only legal power and authority of calling and adjourning the meetings for election within the College. That Mr Burnet was duly elected Rector on the 13th May 1760, for a year, and that Messrs Burnet, Thomson, Skene and Robertson, were duly elected *Procuratores Nationum* on the said 13th May, to continue for a year, or at least at one or other of the meetings on the 27th of November or 9th December 1760, and entitled to vote and act accordingly. That the Professors of Divinity and Oriental Languages have no title to vote in the election of a Professor of Civil Law, or any other master or member of the College. And as a consequence, from the premises, that the appellant, Mr Thom, and not the respondent, Mr Dalrymple, was duly elected.

The respondents argued that the Principal had no right to a double vote in the election of a Rector, because the words *istis electionibus*, in the deed of foundation, did not refer to the election of a Rector, and because it had never been the practice so to vote—that the President of the Court of Session had not a double vote in the judicial determinations of the Court, and as a consequence that Mr Middleton was duly elected Rector in May and in November 1760. They farther insisted, that the *Procuratores Nationum* ought to be named, only in the event of an actual vacancy

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in hunc effectum, for the more formal proceeding to an election, and that their office ceased immediately after the election. That the *Procuratores*, chosen by means of Mr Catanach's vote, on the 13th of May, must be rejected, and those chosen on the 27th of November, after the vacancy had actually happened, were the only legal *Procuratores* entitled to vote at the election; and in support of this, they produced a particular form of record of elections of several instances where *Procuratores* were chosen *in hunc effectum*, after the vacancies had happened.

The following interlocutor was pronounced:—"On report "of the Lord President, in place of Lord Alimore, the Lords "repel the reasons of suspension, and find the letters orderly "proceeded; and with respect to the reduction and declarator, "they sustain the defences, assoilzie the defender, and "decern."

On reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought to the House of Lords. Mar. 10, 1762.

After hearing counsel,

It was ordered and adjudged that the interlocutors herein complained of be, and the same are hereby affirmed, and that the appellant do pay to the respondent £50 costs for the suit.

For the Appellants, *W. Blackstone, Al. Forrester.*

For the Respondents, *C. Yorke, Tho. Miller.*

NOTE.—Unreported in the Court of Session.

JOHN SPOTTISWOODE of Spottiswoode, . *Appellant;*

JAMES BURNETT, Esq. of Craigend, . *Respondent.*

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House of Lords, 22d March 1763.

SUPERIOR AND VASSAL—NON-ENTRY—PENALTIES.—In a declarator of the right of superiority combined with an action of non-entry. Held (1), That the right of superiority was in the Crown and not in the appellant. Reversed in the House of Lords. (2) In the House of Lords the vassal was held not to

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be liable for the penalties of non-entry, that is, the full maills and duties of the lands, except from the date of citation in this declaratory action.

Soon after the Reformation, the Barony of New Abbey, comprehending the whole lands, *property*, and *superiority* which belonged to the Abbot and Convent of New Abbey, was annexed to the Crown by the Annexation Act, 1587.

Sir Robert Spottiswoode, the appellant's great-grandfather, was seized in the Barony of New Abbey, by virtue of a charter under the Great Seal from James VI., which declared, that the vassals of New Abbey should hold *in capite* of Sir Robert; and promising that an Act should be obtained in the next Parliament for dissolving the said barony from the Crown.

Accordingly, in 1633, such an Act passed in the Parliament of Scotland; and this Act is expressly excepted from the general act, by a *salvo jure cujuslibet*, at the end of that Act of Parliament.

1634. King Charles I. having agreed with Sir Robert for the purchase of New Abbey at £3000, the lands were resigned into the King's hands *ad perpetuam remanentiam;* and immediately after the King, by charter under the Great Seal, annexed them unalienably to the See of Edinburgh, just then erected.

In place of money, however, *Sir Robert* only received King Charles' bond for the price. But the Bishop of Edinburgh was immediately let into possession.

In 1640, Episcopacy was abolished by Act of Parliament; but the antecedent right of the king to the estates which he had purchased for the new erected See of Edinburgh having been reserved, his majesty, by his royal signature (reciting the purchase from Sir Robert Spottiswoode, the grant to the bishopric, the abolition of the Episcopacy whereby the barony returned to the king, and that the price had not been paid), regranted, and gave back the said lands and barony to Sir Robert and his heirs.

The public disorders which ensued, and the share Sir Robert (who was attainted and beheaded for his adherence to the king) had in them, prevented him from getting possession, as well as from obtaining a charter and infeftment on the signature.

In 1660, on the Restoration, Sir Robert Spottiswoode's forfeiture was reversed by Act of Parliament, and, in Octo-

ber 1660, his son, Alexander, obtained a new signature from King Charles II., reciting the former one of 1641; and that, by the death of Sir Robert, the foresaid lands, as well as the bygone rents thereof belonged to Alexander, his eldest son, and therefore directing a charter to pass under the Great Seal in favour of him, his heirs, and assignees.

In consequence of this grant, Alexander Spottiswoode did attain possession; but dying soon after without completing his title by charter and infeftment; and Episcopacy having been restored by Act of Parliament in 1662, the Bishop of Edinburgh (*Alexander's* children being infants), got possession, which possession continued till 1689, when Episcopacy was again abolished, whereby the possession as well as the right of all bishop's lands, returned to the Crown.

John Spottiswoode, the eldest son of Alexander, applied to the Parliament of Scotland by petition, setting forth the facts as above stated, and praying for relief; his petition was remitted to a special committee, who, after hearing counsel, as well for the Crown as for the petitioner; and "Having "considered the foresaid petition with the remit thereof, and "the several writs founded upon therein, and in presence of "his majesty's advocate, revised and considered the same; "they find, that *Sir Robert Spottiswoode* did acquire from "Sir John Spottiswoode, gentleman of the bed-chamber, all "and hail the lands, baronies of New Abbey, &c., and that "he was lawfully infeft in the lands and others above speci- "fied, upon the 16th day of March 1624, as the sasine and "warrant thereof produced bear; and that King Charles I. "acknowledges the lands and barony of New Abbey, and "others abovementioned, to pertain to Sir Robert, and had "been at the king's earnest desire resigned *ad perpetuam* "*remanentiam;* the king having then of purpose to modify "and annex the same to the bishopric of Edinburgh; and "that Sir Robert had never received any satisfaction there- "for; and because the estate of bishops had been thereafter "suppressed, that his majesty disponed back the foresaid "lands and barony of New Abbey to Sir Robert, as the "signature under the king's hand, the 29th day of October "1661 produced, bears. And they found that King Charles "II. makes mention of the foresaid acknowledgments made by "King Charles I., and, therefore, gave of new again to Mr "Alexander Spottiswoode, eldest son to Sir Robert, the said "lands and barony of New Abbey, and others foresaid, in "the same manner as King Charles I. had disponed them to

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" Sir Robert his father, with the bye-gone rents, not paid to " him since the year 1641; as the said signature under the " king's hand, dated the 26th day of October 1660 produced, " bears; which signature did not obtain its effect in respect " of the clauses in the Act of Parliament 1662, restored " bishops. And, therefore, it was, and is the opinion of the " said committee, that it ought to be declared, that the said " clause in the Act of Parliament 1662, restoring bishops, " cannot prejudge the petitioner; and that the price never " being as yet paid, the said lands and barony of New Abbey, " and others, do pertain to him, at least the price. And that, " therefore, the petitioner ought to be effectually recom- " mended to the King's Majesty and the Lords Commis- " sioners of the treasury and exchequer, for passing a new " signature thereof in favours of the petitioner, conform to " the signature formerly granted to his grandfather, in the " year 1641, and that he ought to be presently reponed to " possession accordingly unless he get the price."

In consequence of this report, an Act of Parliament was passed declaring that the clause in the Act of Parliament 1662, restoring bishops to their estate and possession, as by them enjoyed in the year 1637, cannot prejudge the petitioner; and that the price never having been paid by the king, these and the barony of New Abbey ought and do thereby belong to the said John Spottiswoode, or at least the foresaid price thereof, together with the annual rent. And this Act ordered him to be put into possession, unless the foresaid price be paid.

The appellant was the eldest son of the said John, and heir to him as well as to Alexander and Robert Spottiswoode. He brought an action of declarator in the Court of Session against the officers of State for declaring his right to the lands and barony of New Abbey under the titles above stated.

It was admitted by the Crown that the appellant's family had been very unfortunate in respect of the sale of this estate in the year 1633, to King Charles I., and that Sir Robert Spottiswoode divested himself fully of the property, without getting payment or effectual security for the price; and that at no time betwixt and the Revolution, had any satisfaction been made.

June 28, 1740. The Court of Session, by interlocutor of this date, found, " That although it appeared to them that the pursuer was " justly entitled to a charter from the Crown, of the lands of

" *New Abbey* in question, or to the payment of the price " thereof, in virtue of the Act of recommendation of the " Parliament of Scotland, in the year 1695, in favour of Mr " John Spottiswoode, his father, deceased, they, the said " Lords, had no jurisdiction to grant any execution upon " that Act for obtaining such charter, or recovery of the " price. And find, that until such charter is obtained, the " pursuer has no real right to the said lands in question, " whereupon to maintain an action of declarator of pro- " perty, or for mails and duties; and therefore sustain the de- " fence against the action of declarator, or mails and duties, " leaving the pursuer to make his humble application to the " Crown for a proper charter, in terms of the said Act of " Parliament, as he should be advised."

The appellant accordingly obtained his late majesty's charter of the said barony on which infeftment passed, and Dec. 1741. in virtue of this he had possession and was acknowledged as superior by many of the vassals of the barony.

The respondent, however, refused to acknowledge the appellant as superior, and he had taken out a charter from the Crown of the lands of Craigend being part of the lands held of the barony, and the appellant was under necessity of bringing action of declarator to have his right to the superiority of these lands declared; and that the same were in non-entry, and for the maills and duties.

After hearing both parties, Lord Alimore, Ordinary, by interlocutor, of this date, found, " That as the charter Dec. 10, 1761. " from the Crown, in favour of the pursuer, anno 1742 " (1741?) proceeds upon the narrative of the charter 1624, " the signature 1641, the signature 1660, the declaration of " Parliament 1695, and the decree of the Court of Session " 1740, that charter ought to receive the most liberal con- " struction in order to restore the pursuer to the full right " and title of the lands and barony of New Abbey, &c., as " the same stood in the person of Sir Robert Spottiswoode, " the pursuer's great-grandfather, in the year 1634, when he " resigned the same into the hands of the Crown, for a price " which was never paid. Finds, that by virtue of the charter " 1624, and the Act of dissolution 1633, Sir Robert Spottis- " woode, was, in the year 1634, entitled to the superiority of " the lands formerly held of the Abbacy of New Abbey. " Find that the Act 1690, declaring the superiorities which " pertained to bishops, to belong to the Crown, ought not to " be extended to the superiority of New Abbey, in respect

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"that by the declaration of Parliament 1695, it is declared, "that the Act 1662, restoring bishops to their possessions as "in the year 1637, did not prejudge the pursuer's father. "And, therefore, find that the pursuer is entitled to the supe- "riority of the defender's lands in question, which had con- "fessedly been held of the Abbey of New Abbey; and that "these lands are in non-entry; and decerned and declared "accordingly."

Feb. 24, 1762. On representation, the Lord Ordinary adhered.

On reclaiming petition from the respondent, he admitted, that his lands of Craigend held originally of the Abbot and convent of New Abbey, and afterwards of the Bishop of Edinburgh, but contended, that by virtue of the several Acts of Parliament, he was entitled to hold immediately of the Crown.

The appellant answered, That though several Acts of Parliament, had declared the just title of this family to the lands in question, yet none of the succeeding heirs of the family were able to obtain possession of the lands until his late Majesty, in compliance with the recommendation of his Parliament, and the decree of the Court of Session, was induced to grant the charter 1741, and, therefore, that these lands ought to be considered as vested in the appellant, in the same manner, and as fully as his great-grandfather had possessed in 1634, before he resigned.

That the possession of the bishops and of the Crown after the signature 1641, was without a just title and to the prejudice of the appellant's family; and even though there had been an apparent legal title, yet, as it is now admitted that the substantial right, though uncompleted, was all the time in the appellant and his ancestors, and is now *really* and completely vested in him, by his late Majesty's charter and infeftment following thereupon, the possession of the bishop and of the Crown, so circumstanced, could only affect this right, in the case of a *bona fide* alienation to a stranger for a full consideration and without notice; all gratuitous and voluntary Acts to defeat the right which remained in the appellant's family must go for nothing; and from the same principle, the Act 1690, which gave the vassals of bishops the privilege of holding immediately of the Crown, cannot be extended to the lands in question, which, though at the time wrongfully in possession of the bishop, yet truly belonged to another person.

July 14, 1762. The Court of Session pronounced this interlocutor: "Find

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"James Burnett is entitled to hold his lands of the Crown, "and, therefore, assoilzie the said defender, and decern."

On reclaiming petition the Court adhered.

Against these last two interlocutors the present appeal was brought to the house of Lords.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, reversed; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 10th of December 1761, be, and the same is hereby, affirmed, with an addition after the words ("and that these lands are in non-"entry"); of the following words, viz., ("but so as not to "affect the respondent with any penalties on account "of such non-entry, except from the commencement of "the present action"); and it is further ordered, that the said Court of Session do give the proper directions for carrying the judgment into execution.

For the Appellant, *C. Yorke, Tho. Miller, Al. Wedderburn.*

For the Respondents, *Al. Forrester, H. Dalrymple.*

[Thomson on Bills, p. 164.]

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ALEXANDER BREBNER, Merchant in Portsoy, *Appellant;*

JOHN HALIBURTON AND COMPANY, Merchants in Edinburgh, . . . *Respondents.*

House of Lords, 13th December 1763.

BILLS—NEGOTIATION—NEGLECT.—The appellant sent three bills to the respondents (with whom he had dealings in business) for the purpose of negotiation and payment, indorsing them for that purpose. The respondents delayed timeously to present the bills for payment, and failed otherwise in duly negotiating the same, but they sent them to Boyd in Glasgow, with whom they had dealings, who failed with the proceeds in their hands. Held (1), That there was no culpable negligence on the part of the respondents to subject them in liability, and (2) As regarded the sum of £200 sent by Boyd to Haliburton, on 25th March, sought to be imputed *pro rata* of this debt, this remitted to the

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Lord Ordinary. In the House of Lords reversed, and held the appellant entitled to credit for the three bills, as from 25th March 1762, when they were recovered.

The appellant, living in the north of Scotland had been in the practice of having business dealings with the respondents.

On the 2d March 1752, the appellant sent in a letter to the respondents, three bills drawn by another person, payable to the appellant, one for £124, 3s. 4d., upon merchants in Greenock, payable 14th March same month; the other two, of which one was for £151, 7s. 9d., the other for £19, 13s, 9d., upon merchants in Paisley, payable on the 25th of the said month. In all amounting to £295, 4s. 10d.

These bills were endorsed to the respondents, Haliburton and Company, that they might negotiate the same and receive the contents; and as they were considered to be equal to cash, the appellant, by his aforesaid letter, directed the respondents, out of the contents, to pay £230, being the price of a ship or vessel he had purchased.

The appellant stated that his letter of 2d March, with the bills enclosed, must, in course of post, have reached the respondents, in three days after its date, that is, upon the 5th March, with the bills enclosed, and the contrary not having been alleged at the time, the fact certainly was so, though the respondents did not acknowledge the receipt thereof sooner than by letter to the appellant of the 12th, in which the respondents promised, in the usual way, to negotiate the bills, and to credit the appellant therewith.

Including the three days of grace, the bill upon Greenock, being payable the 14th March, fell due on the 17th; and the bills upon Paisley being payable on the 25th, were to become due on the 28th; and it was the course of business, and the respondents' indispensable duty, immediately on receipt of those bills, either to have negotiated them at Edinburgh, where the money might have been had for them, or if that could not be done, to have sent them to Greenock and Paisley, or to Glasgow, which is in the neighbourhood of both these places, by the first post after he received them, which fell to be on the 6th March, to be there duly negotiated. Instead of doing this, however, the respondents kept up these bills, and totally neglected to send away these bills for negotiation or for payment, till the 19th March, *fourteen* days after Haliburton had received them, and two days after the

days of grace were run upon the one payable at Greenock, which appeared from the respondents' letter to Mr Boyd, merchant, Glasgow, to whom these bills were then sent for negotiation and payment.

It turned out that Boyd endorsed all these three bills away on his own account, and got immediate cash for them.

At least, it appeared, that he had recovered payment of the Greenock bill; and also of the others, although this was concealed by him; but it did not appear that the respondents had been very diligent in calling him to account. On the 25th March, Boyd remitted to Haliburton and Company £200, desiring them generally to place the money so remitted to his (Boyd's) credit; and that some days after he remitted £100 to be also placed to his credit.

The respondents, however, holding that these latter remittances had been sent on their own account as creditors of Boyd, and Boyd having become bankrupt soon thereafter, refused to give the appellant credit for the amount, and thereafter brought an action against the appellant for payment of £466, 7s. 4d. as the balance pretended to be due by the appellant.

In defence to this action, the appellant stated several objections to the items, which made no part of this suit, but in particular, he claimed allowance or credit in the account for the sum of £295, 4s. 10d., being the contents of the three bills before mentioned.

In answer, the respondents stated, that they had transmitted the bills to the said Robert Boyd at Glasgow, who was in good credit at the time; that though Boyd had received the contents of these bills, even before all the bills became due, he had concealed his having the money, and only gave them promises and assurances, from time to time, that this money would be soon paid and remitted, till at length he became bankrupt in May 1752; and that the loss arising from Boyd's insolvency could not fall on the respondents.

The Lord Ordinary (Shewalton), pronounced this interlocutor; "Having considered the forgoing debate, with the "representation for the defender, relating to the three bills "endorsed to Mr Boyd at Glasgow, answers for the pursuer, "&c., finds, that the defender is not entitled to have credit "for £290, the contents of the three bills sent by the pur- "suer to Mr Boyd at Glasgow, in respect it does not appear "Mr Haliburton was guilty of any culpable negligence in

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"recovering the contents of the said bills; finds, that the "defender is not entitled to any proportion of the £200 "sterling, remitted by Robert Boyd to Haliburton, on the "5th March 1752, in respect that money was not remitted "to Mr Haliburton, on account of the defender's bill, but in "payment of the bill drawn by Coutts and Company upon "Mr John Boyd, but finds the defender entitled to a pro- "portional part of the £100 afterwards remitted by Boyd to "Haliburton *pro rata* of the debts due from Boyd to Hali- "burton and the defender."

On reclaiming petition from the appellant to the Court, July 30, 1762. the Lords pronounced this interlocutor: "Adhere to the "Lord Ordinary's interlocutor, with this variation, that the "three bills sent by the pursuers to Mr Boyd at Glasgow, "amounted to £295, 4s. 10d., instead of £290 specified in "the interlocutor; and with this variation, they adhere to "the Lord Ordinary's interlocutor, and refuse the desire of "the petition; find the defender (appellant) liable in the "expense of extracting the decree, as the same shall be ascer- "tained by the collector of the clerk's dues; but find no "other expenses due, and remit to the Lord Ordinary to "proceed accordingly."

On reclaiming petition to the Court, the Lords pronounced Aug. 11, 1762. this interlocutor: "Having heard this petition, refuse the "same, in so far as respects the first article, whether the "petitioner is entitled to have credit, in his account current "with the pursuer, for £295, 4s. 10d., and in so far adheres "to their former interlocutor; but ordain the petition to be "seen and answered against the 16th day of February next, "upon the second article, viz., whether the £200 sterling "remitted by Boyd to Haliburton on the 25th March 1752, "ought to be imputed *pro rata* to the whole sums which "Boyd, at the time, was due to Haliburton."

Nov. 24, 1762. On further reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

Journals of the House of Lords. It was ordered and adjudged that the interlocutors complained of be reversed; and it is further declared and adjudged, that the appellant is entitled to have credit in his account current with the respondents for £295, 4s. 10d. being the amount of the three bills in question in this

cause, as upon the 25th March 1752, when the money was received by Boyd; and it is further ordered that the Court of Session do give the proper directions for carrying this judgment into execution.

For the Appellant, *Alex. Lockhart, R. Mackintosh.*

For the Respondents, *C. Yorke, Al. Wedderburn.*

THE EARL OF ABERCORN, . . . *Appellant;*
ANDREW WALLACE of Woolmet, Esq., W.S., *Respondent.*

House of Lords, 25th January 1764.

LEASE of COAL—CLAUSE AS TO LEVEL.—Held, that a clause in a lease of coal, by which it was agreed that either party was to have the power of communicating the level of the said coal to any neighbouring coal works, did not cease or determine with the lease, but continued so long as the lessee continued to possess a right and interest in the neighbouring coal-work.

A lease of coal was granted by the appellant to the respondent's brother-in-law, in which there was the following clause: "And it is hereby declared, that it shall be in the power of "either parties, or their foresaids (if they shall hereafter find "it necessary), to communicate the level of the said coal to "any neighbouring coal-works: Providing always, that they "be obliged like as they hereby bind and oblige them and "their foresaids, to submit to arbiters, to ascertain the consi- "deration to be paid by any one of the said parties to the "other on that account; upon payment whereof, both the "said parties are hereby obliged to consent and agree to such "communicating reciprocally."

Immediately follows the clause whereby "John Biggar "(the respondent's brother-in-law), binds and obliges him "and his foresaids, to leave a sufficient chinny wall between "the Duddingston coal and those of the neighbourhood; and "if he and his foresaids shall at any time take the water from "the corn-mill (of Duddingston), so that there shall not "remain a sufficiency for working the said mill regularly, in "that case, he shall either satisfy the tenant of the corn-mill "for his damages, or shall take the said mill at the same rent "it is then let at."

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The lease concluded with this clause: "And it is hereby "mutually agreed on and declared, that though the said "coal should wear out during the continuance of this "tack, yet, notwithstanding thereof, the present tack shall "subsist, in so far as extends to all the other particulars "above set (separate from the coal), and whole tack duties, "and other prestations stipulate thereanent, in the same "manner as if the tack of the coal had not been compre- "hended herein."

Some years after, Mr Biggar, the lessee, began to carry on a level in one of the seams, or veins, of the Duddingston coal, which, after his death, was continued by Andrew Wallace, now of Woolmet, his brother and successor (the respondent), with the avowed intent of communicating the benefit of this level, not only to the neighbouring colliery of Niddry, of which he obtained a lease, but to all the collieries, however remote, that could be benefited by it, and without any regard to the term limited by the lease before recited.

In 1755, the appellant being informed of the respondent's intentions, soon after applied to the Court of Session for a suspension or stop of the work, and likewise brought an action of declarator, to have it found and declared, that the lessee's right of communicating the level of the Duddingston colliery was limited to the terms of the lease, and to the collieries next adjacent to those of Duddingston.

The appellant contended, 1st, that the privilege granted to the lessee must be understood as relative to the lease, and could not subsist any longer than the term to which it was limited, and could not be construed, as the respondent contended, into a perpetual right of servitude.

2. That this privilege of communicating the level, could not be extended further than to *the next adjacent or co-terminous collieries*, such as those of Brunston, or the colliery of Niddry. That the words, "any neighbouring coal works," contained in the lease, if taken in this sense, clearly established the extent of privilege; but if they are extended further, there is no knowing where they shall stop.

March 6, 1761. The Lords first pronounced this interlocutor: "Find, that "by the conception of the tack in question, it is competent "to either party, the pursuer or defender, to communicate "the level of the Duddingston coal to any neighbouring "coal-work, even though such neighbouring coal-work is not "immediately adjacent to the Duddingston coal; the party "who communicates the said level being liable to pay to the

" other party such valuable consideration for his consent, as " shall be ascertained by arbiters mutually chosen," &c.

On further petition, the Lords pronounced this interlocutor: " Find that, the communication of the level being " granted during the currency of the tack by the lessee, to " a neighbouring coal work, is not determinable by the term " of the tack, but that the same may subsist for the use of the " lessee and his heirs, so long as they shall continue to have " right or interest in the neighbouring coals to which the " level may be communicated, as the said neighbouring coals " are ascertained by the interlocutors of the 23d December " 1760, and 6th March 1761."

June 24, 1762.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby, affirmed.

For the Appellant, *Thos. Miller, Thos. Sewell.*

For the Respondent, *C. Yorke, Al. Forrester.*

ARCHIBALD and JAMES CANISON, . . *Appellants;*

DAVID MARSHALL, ... *Respondent.*

House of Lords, 27th January 1764.

REDUCTION—FORCE AND FEAR.—A reduction was raised of certain deeds impetrated from the respondent's mother, under the threat that the deed granted in her favour by her father was forged, and that he could procure them to be hanged for it, whereby she, with consent of her husband, was induced to grant a disposition of the estate left her by her father, and also to execute a renunciation of her right: Held these deeds invalid and ineffectual, and reduced accordingly.

William Weir was proprietor of one half of the estate of Sunnyside, and an action of reduction was brought by the respondent, as heir in general to his mother, Anne Weir, or Marshall, against the appellants, to set aside a disposition executed in 1736, by his mother, with his father's consent,

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in favour of Alexander Canison, setting forth expressly, that William Weir, deceased, had in his lifetime made a disposition of his whole heritable estate to his daughter, Anne Weir (Mrs Marshall), and her heirs, upon the failure of his son, Robert, and the heirs of his body. That Alexander Canison and his curators, raised a process of reduction and improbation for setting aside that disposition as false and forged, and had threatened to have the respondent's father and mother hanged, as the forgers of it. That being terrified by such unjust and arbitrary threatenings, they were *vi et metu* compelled and concussed to grant the deed in question, without receiving any consideration therefor, and a note of a 100 guineas was also extorted from them; and therefore concluding not only for reduction of that deed *ex capite vis et metus;* but also for repetition of payment of 100 guineas, with interest from 13th March 1736, and for an account and payment of the rents of a half of the said William and Robert Weir's estate for the year 1736, and subsequent years, at the rate of £100 sterling per annum.

The appellants still insisted in their allegations of forgery, which the respondent denied.

A proof was allowed and reported. Upon the result of

Nov. 24, 1762.

which the Court pronounced this interlocutor: "Find the "reasons of reduction relevant and proven, and therefore "reduce the disposition granted by Anne Weir, second lawful daughter, and one of the two apparent heirs portioners, "and of line of the deceased William Weir of Sunnyside, "with consent of David Marshall, surgeon in Hamilton, her "husband, in favour of Alexander Canison, only lawful son "of the deceased John Canison, town-clerk, Hamilton, renunciation and discharge granted by the said Anne Weir, "with consent of her husband, in favour of the said Alexander Canison, both bearing date the 13th March 1736, "and both ratified by the said Anne Weir, of the same date, "with the instrument of sasine following thereon: as, also, "disposition by the said Alexander Canison, in favour of "James Canison, writer in Hamilton, and Archibald Canison, merchant there, defendants (appellants), dated 10th "April 1749, and instrument of sasine following thereon, "with the charters and infeftments obtained from the superiors, in favour of the said James and Archibald Canison, "in so far as relates to the equal half of the heritable subjects "thereby conveyed, which belonged to the deceased William "Weir, and afterwards to the also deceased Robert Weir, his

" son; and decern and declare accordingly. Find the de-
" fendants (appellants) liable in the expense of process, of
" which ordain an account to be given in; as also in the ex-
" pense of extracting the decree, as the same shall be certified
" by the collector of the clerk's dues, and decern, and remit
" to the Lord Ordinary, who pronounced the act, to hear
" parties' procurators on the other conclusions of the libel,
" and to do and proceed therein as he shall see cause."

On reclaiming petition the Court adhered. Jan. 21, 1763.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby, affirmed, with £100 costs.

For the Appellants, *C. Yorke, Al. Forrester.*

For the Respondent, *Thos. Miller, Alex. Wedderburn.*

JOHN WALKER, one of the Bailies of Edinburgh, JAMES STUART, THOMAS HOGG, WM. GIBSON, Councillors, and Others, *Appellants;*

GEORGE DRUMMOND, Esq., Lord Provost, and Others, the Magistrates and Town Councillors of the City of Edinburgh, *Respondents.*

House of Lords, 13th March 1764.

PATRONAGE OF THE CITY CHURCHES.—The rights of presentation to the parish churches of the city of Edinburgh belong to the Lord Provost, Magistrates, and Town Council, as patrons thereof; and the Presbytery of Edinburgh, by their several Kirk Sessions, has no voice in the election or presentation to any vacancies in the parish churches within the city.

The respondents are the patrons of, and have the right of presentation to all the parishes within the city of Edinburgh; and, on a vacancy occurring in 1762, in one of the city churches, they gave a presentation to Mr Drysdale to the vacant benefice.

The appellants brought a suspension and interdict; and

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also an action of reduction of that presentation, alleging that, under an agreement 1720, between the respondents on the one part, and the Presbytery of Edinburgh on the other, it was agreed that the several Kirk Sessions of the parish churches should be permitted to vote with them in the choice of the ministers; and they contended, that this not having been done, the election was void.

It was answered, that it was true that an agreement of the nature described had been gone into; but finding that it led to the very evils which it was meant to prevent, a reduction in 1739 was brought of that agreement; and the Lords of Council and Session, after considerable discussion, reduced the same, and found and declared "the Lord Provost, "Magistrates, and Town Council of Edinburgh, to have the "only right of presenting ministers to all the vacant churches

Feb. 18, 1763. "built, or to be built, within the city."

The Lord Ordinary pronounced this interlocutor: "Having "considered the minutes of debate, &c., finds that the Magis- "trates and Town Council of Edinburgh, have the sole privi- "lege, exclusive of, and without consulting the ministers and "kirk-sessions, of presenting ministers to all the vacant "churches within the city of Edinburgh; and therefore "repels the reasons of reduction with respect to that point, "assoilzies the defenders in the reduction, and decerns. But "with respect to the proceedings of the Town Council, with "regard to the presentation of Mr John Drysdale, before "answer, appoints the chargers to give in answers to the sus- "penders' condescendence."

After several representations to the Lord Ordinary, who adhered, a reclaiming petition was presented to the Court,

July 1, 1763. and the Lords unanimously adhered; and thereafter ordered a special condescendence to be given in; whereupon, and

July 15, 1763. after considering this condescendence, the Lords pronounced this interlocutor: "Repel the reasons of suspension, and "reduction of the presentation granted to Mr John Drysdale, "find the letters orderly proceeded with, assoilzie the de- "fenders from the reduction and declarator. Find no ex- "penses due, and decern."

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, affirmed.

For the Appellants, *C. Yorke, R. Mackintosh.*

For the Respondents, *Fl. Norton, Alex. Wedderburn.*

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[Dickson on Evidence, p. 986, *et* p. 644.]

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ARCHIBALD DOUGLAS, Esq. of Douglas, an Infant, and his Guardians, Her Grace the DUCHESS DOWAGER OF DOUGLAS; His Grace the DUKE OF QUEENSBERRY, and Others, ... } *Appellants;*

The DUKE OF HAMILTON; LORD DOUGLAS HAMILTON, and their Guardians, SIR HEW DALRYMPLE, Bart., and Others, } *Respondents.*

House of Lords, December 1764.

TITLE TO SUE—PROOF—WITNESS—RE-EXAMINATION.—Held (1) that the respondents had sufficient title and interest to sue. (2) That it was competent to examine witnesses of new, who had been examined in Paris, in a process *tournelle criminelle*, in regard to the same matters. (3) That it was not necessary to make the cancellation of the witnesses' previous testimony an absolute condition of their being examined of new; and, therefore, their evidence allowed to be taken, but to be sealed up, reserving all objections. (4) Copies or excerpts of documents, and proceedings had before a foreign court, were ordered to be produced in case the originals themselves could not be got, or delivered up.

Archibald Douglas, the infant appellant, had been served heir to the Duke of Douglas, his grandfather, upon a proof taken that he was the eldest lawfully born child of the marriage of Lady Jane Douglas with Sir John Stewart. Under this service, he had attained possession of the estate, when the respondents brought a reduction of that service, and for declaring their right to the estate.

Before this action was called in Court, and some days after the summons was executed, the respondents applied for and obtained an order to have the examination of Sir John Stewart taken to lie *in retentis*, which was done, and sealed up accordingly.

The allegation of the respondents being, that Lady Jane and Sir John Stewart had adopted two foundlings in Paris as their children, the appellants stated, that through the agency of James Stewart, they had set on foot a prosecution

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against Lady Jane and Sir John Stewart, before the Parliament of Paris, to have them punished criminally, for setting up supposititious children. In this process, called the process Tournelle, several witnesses were examined, writings were produced, and police books founded on.

June 21 and 30, 1763.

The appellants objected to the respondents' title to sue, but the Court repelled that objection.

It was stated that the intention of this process Tournelle was to prepare witnesses to be examined afterwards under the authority of the Court of Session, and to oblige the persons examined before the Tournelle, to stick to a tale once told, whether true or false, under pain of perjury. It was with a similar view that Sir John Stewart's examination was demanded so early in the stage of the proceedings.

Having complained of these proceedings, to the Court of Session, that Court ordered the respondents to specify and explain if these proceedings were adopted with their sanction. They confessed they had been so adopted.

Thereafter, the respondents put in their condescendence, consisting of sixty-one separate articles, the first forty-three articles containing a detail of Sir John and Lady Jane's journey to Paris, with many circumstances tending to raise a suspicion that Lady Jane could not be delivered of twins at the time and place mentioned in the service.

The Lords of Session having heard counsel upon the matters contained in the condescendence, and the appellant having particularly insisted that the illegal methods taken to prepossess the witnesses examined in the Tournelle, should be held as a total objection to those witnesses in the present action; the Court appointed informations on these points.

July 27, 1763.

Upon advising these informations, this interlocutor was pronounced:—"Before answer, allow the pursuers (*i.e.* respondents) to prove the facts contained in the condescendences given in for them; and allow to the defenders (*i.e.* appellants) a conjunct probation, and both parties to prove every other fact and circumstance which they may judge material in the cause; and for that effect grant commission to both parties: Find the objection that certain witnesses had been examined before the Tournelle Criminelle of the Parliament in Paris, not relevant to incapacitate those witnesses from being examined as witnesses in this cause, reserving all objections to their credibility, when the proof comes to be advised. But find that the pursuers, before executing the commission now granted, must give in a

" petition to the Parliament of Paris, praying that the depo-
" sitions of the witnesses taken, in consequence of the plaintes
" at the instance of any of the pursuers, may be delivered
" up to the Commissioner to be named by the defenders, that
" these depositions may be cancelled; and also praying,
" that inspection be granted to the defenders of plaintes,
" records, or writings produced therein, and whole procedure
" had thereon, with liberty to the defenders to take copies,
" extracts, or excerpts thereof. And in case the depositions
" cannot be delivered up, find the pursuers must procure to
" the defender, or his agents at Paris, free access to, and
" inspection of, the plaintes, proofs, books, writings, and
" whole procedure had in these plaintes, before the Tournelle
" Criminelle, and liberty to the defender to take copies ex-
" tracts or excerpts thereof; and this at least fifteen days
" before the pursuers examine any witness that has been
" adduced before the Tournelle Criminelle. And the Lords
" hereby discharge the pursuers, upon their peril, to examine
" any more witnesses, or to give in any more plaintes relative
" to the question in issue between the parties in this cause
" before the Tournelle Criminelle, or any other Court in
" France, or to carry on any farther procedure in the pro-
" secution of the said plaintes, after the 11th of August
" next, and during the dependence of this cause: And find
" that no witnesses examined at the instance of the
" pursuers, before any Court in France, from and after the
" 10th August next, shall be admitted as witnesses in this
" cause. Find that the pursuers must procure inspection to
" the defenders, or their agent at Paris, of all such letters to
" the Lieutenant-General, or other present officers of the
" police, relative to the matters in issue between the parties,
" as shall, between the 15th day of August next, be specially
" condescended on at Paris by the defenders or their agent,
" as shall be extant at the time; and also of all books and
" registers of police, or other writings, relative to the matters
" in issue between the parties, which have been founded on
" by the pursuers, or which have been or may be communi-
" cated to him, and are in the custody and possession of the
" Lieutenant-General de Police, or other officers of the police,
" with liberty to take copies or extracts or excerpts from
" them, at least fifteen days before any witness can be ex-
" amined for the pursuers in France."

On reclaiming petition to the Court, the Court pronounced this interlocutor:—" Adhering to their former interlocutor,

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Aug. 11, 1763.

" with these additions, that they appoint the depositions of " the witnesses who have been examined before the Tournelle, " to be sealed up separate from the testimonies of the other " witnesses to be examined, and to transmit them as sealed " up, not to be opened by either party without the authority " of this Court; reserving to the defender to object against " these examinations being made part of the state: And " find that the defenders may examine any of the witnesses " that may have been examined before the Tournelle, whether " the pursuers shall have complied with the conditions of this " or the preceding interlocutor in the cause or not: And " find that the pursuers must procure free access to the de- " fenders or their agents, to the proofs taken at Rheims, " before the Commissioners of the Parliament of Paris, and " also to any proof that may have been taken in England or " Scotland, and to all reports that have or shall be made by " the Curées to the Parliament or Procureur-General, in " consequence of the monitoire which the pursuers have had " inspection of, or are possessed of; and, if desired, shall " join with the defenders in any application for getting pos- " session or inspection of them."

Dec. 21, 1763.

On further reclaiming petition, the Court pronounced this interlocutor:—" But with this farther explanation, that before " proceeding to the examination of any of the witnesses who " have already been or shall hereafter be examined in the " Tournelle Criminelle of the Parliament of Paris, either at " the instance of the Procureur-General, or at the instance " of the pursuers, the pursuers shall be obliged to comply " with the conditions contained in the former commission. " And ordain the pursuers and their doers, betwixt this time " and the 1st January next, to produce, in the hands of the " clerk to this process, copies of the whole plaintes given " in by Sir Hew Dalrymple, and in name of the Duke of " Hamilton and his tutor, or either of them, to the Tournelle " Criminelle of Paris, on or since the 16th day of December " 1762. And appoint the clerk of this Court, to furnish the " pursuers with an extract of this judgment, to enable them " to make due intimation thereof in manner above set forth."

Dec. 24, 1763.

On further petition the Court adhered.

Against these interlocutors, the appellants brought this appeal to the House of Lords, 1st, In so far as these interlocutors sustained the respondents' title to sue; 2d, In so far as they found the objection to the witnesses examined before the Tournelle Criminelle, not relevant to incapacitate these

witnesses from being again examined; and 3d, In so far as it did not make the cancellation of their evidence an absolute condition, in case these witnesses were re-examined. There was a cross appeal on the part of the respondents.

Journals of the House of Lords.

After hearing counsel, &c., upon the original appeal of Archibald Douglas, complaining of an interlocutor of the Lord Ordinary of 21st June 1763, and of five interlocutors of the Lords of Session of the 30th June, 27th July, 11th August, and 21st and 24th December, 1763, and praying, &c., and likewise upon the cross-appeal of George James, Duke of Hamilton, and his trustees, and Sir Hew Dalrymple of North Berwick, Baronet, complaining of two interlocutors of the Lords of Session, of 27th July and 11th August 1763, and two interlocutors of 21st December 1763, and praying, &c., as also upon the said George James, Duke of Hamilton, and his tutors, Lord Douglas Hamilton, and his tutors, and Sir Hew Dalrymple, put into the said original appeal; and the joint and several answer of Archibald Douglas of Douglas, Esq., an infant, and his guardians, the Duchess Dowager of Douglas, the Duke of Queensberry and others, put into the said cross-appeal; and due consideration had of what was offered on both sides in this cause: It is ordered and adjudged that the interlocutors of 21st and 30th June 1763, complained of be affirmed: And it is hereby ordered, that the interlocutor of the 27th July 1763, in part complained of by the said original and cross-appeals, after the word ("grant") the words ("a new") be inserted; and after the word ("commission to both parties") that following words be inserted ("to be executed in the usual manner, pursuant to the authority thereby given;") and that after the words ("can be examined for the pursuers in France,") the following order and declaration be inserted ("But in case the pursuers shall insist that they cannot procure the depositions or writings above-mentioned, to be delivered up, or obtain inspection thereof, it is hereby ordered, that they shall produce all copies thereof, or of any part thereof, as also all such letters or copies of letters, to the Lieutenant of the Police, or other officers of the police, for the time being, relative to the matters in question, between the parties, and all copies or registers of police, and

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" all writings, memorandums, entries, or extracts relative " to any information or transaction before the curées, " in consequence of the French monitoire, which are in " the custody or power of the pursuers, their attorneys " or agents; such production to be ascertained before " the Court of Session, upon the oath of the pursuers, " their attorneys and agents; and that the pursuers " forthwith do everything in their power to retract or " discharge the said plaints before the Tournelle Crimi- " nelle, and to procure the same to be dismissed"). And it is hereby ordered and adjudged, that the said interlocutor thus amended be affirmed: And it is further order and adjudged, that that part of the interlocutor of the 11th August 1763 complained of in the original and cross appeals, which finds, "that the pursuers must " procure free access to the defenders or their agents to " the proof taken at Rheims, before the Commissioners " of the Parliament of Paris," be reversed; and that the other parts of the said interlocutor be affirmed: And it is hereby ordered and adjudged, that in the foremen-tioned interlocutor of the 21st of December 1763, likewise in part complained of, by the said original and cross-appeals, the words ("with and under the conditions " therein contained"), be left out; and that the following words of the said interlocutor, viz. ("but with this " farther explanation, that before proceeding to the ex- " amination of any witnesses who have already been, or " shall hereafter be examined in the Tournelle Criminelle " of the Parliament of Paris, either at the instance of " the Procureur-General, or at the instance of the pur- " suers, the pursuers shall be obliged to comply with the " conditions contained in the former commission"), be also left out; and that the said interlocutor thus varied, be affirmed: And it is also ordered and adjudged, that the interlocutor of the 21st December 1763, complained of in the cross-appeal, be affirmed: And it is also ordered and adjudged, that the interlocutor of the 24th December 1763, complained of in the original appeal, be also affirmed: And it is hereby further ordered that the consideration of the costs occasioned by the proceedings at Paris, be reserved till the hearing of this cause. And it is hereby declared, that the Court of Session ought not to receive any transmission from the Tournelle Criminelle of the proceedings before the Court. And it is

hereby further ordered that the Court of Session in Scotland do give all proper and necessary directions for carrying this judgment into execution.

For the Appellants, *Fl. Norton, Fra. Garden, Jo. Burnet, David Rae.*

For the Respondents, *Tho. Miller, C. Yorke.*

SIR WILLIAM DUNBAR and SIR ALEXANDER GRANT, Baronets, DUNCAN URQUHART, and ALEXANDER TULLOCH, Esqs., ... } *Appellants;*

ALEXANDER BRODIE of Lethen, Esq., *Respondent.*

House of Lords, 15th February 1765.

SALMON FISHERIES IN THE RIVER FINDHORN.—(1) Held, that the appellants had right to the fresh water fishings in the Findhorn, and that the boundaries extended from fixed points; and (2) that the respondent had right to the five stells on the east side of the river Findhorn, and that Sir William Dunbar had right to the stells on the west of the said river, and that Mr Brodie had the only right of fishing on the sand beds, and on the east side of the river, at all times of the tide, and also on the west side during the ebbing of the sea, and that he and Sir William Dunbar had right to exercise their stell fishings without any limitations as to the mode of fishing.

King Robert de Bruys, by charter of date 1st July 1309, granted to the Abbot and Monks of Kinloss, "Totam pis-"cariam Aquæ de Findhorn." This was afterwards confirmed by charter from King James the First, which also granted and confirmed, "Zaras suas solitas et consuetas prope "dictum monasterium situatas."

The burgh of Forres having lost its original corporation charter, records, and whole title deeds in the troubles of the times, a new charter, proceeding upon the recital of this loss, was obtained from the Crown, re-establishing the corporation, and regranting to it such estates as were represented anciently to belong to the burgh.

Among other subjects, the fishings of Findhorn, both in fresh water and in salt, were thrown into this grant.

Claims to the right of fishing having been set up by the corporation, and by two other persons, Alexander Urquhart

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Feb. 13, 1505.

and William Wiseman to a part of the fishings of Findhorn, the abbot and they, by contract, came to the following agreement, by which the limits of the appellants' fresh water fishings, were fixed thus: "All and haill the fishings of the fresh "water of Findhorn, lying within the said sheriffdom, running "down from the Sloy Pool, to the entering of the Burn of "Massett in the sea, under the lands of West Grange of "Kinloss; together with all and haill the fishings of the "west side of the salt water of Findhorn to the great sea." "That is to say, to the said Alexander Urquhart eight-sixteen "parts of the fishings of the said haill fresh water of Findhorn, "and to the said William Wiseman, a sixteenth part of the "said fresh water fishings, together with his part of the salt "water fishing on the said west side of Findhorn part, like as "the said burgesses have of the same." The same contract fixes the respondent's salt water fishings thus: "And to the "said burgesses and community of Forres and all the rema-"nant of the fishings of Findhorn above expressed, both in "fresh water and in salt; excepting and reserving to the "said abbot and convent, and their successors, all and haill "the fishings of the east side of the said salt water of "Findhorn, from the entering of the said burn of Massett "running through West Grange of Kinloss in the de-"scending by the yairs and fish houses of Kinloss, to the "bank of Findhorn entering in the great sea, with ebb "and flood, both on the east and west sides, and within all "parts of the said salt water and on the said beds within "the same; the said burgesses and community of the burgh "of Forres, and their successors, paying yearly to the said "abbot and convent, and their successors or factors for the "said fishings of the fresh and salt waters of Findhorn," &c.

The inhabitants of Forres, however, still continuing to make enroachments on the fishings reserved to the abbot and convent, and law suits having ensued, these terminated with another agreement, by which the abbot and convent, in im-

Dec. 22, 1539.

plement of all former agreements, granted a feu charter to the town of Forres, thus: "Septem sex decem partes, vulgariter "seven sixteenth parts piscarium nostrarum aquæ nostræ "dulcis de Findhorn, unum rete vulgariter, an Leith net, in "dicta nostra aqua dulci; nec non piscarias nostras de Aithe-"stell, et tres quartas piscariæ nostræ de Elvinstell, ex parte "occident ali nostræ aquæ salsæ de Findhorn, prout tem-"poribus retroactis dicti Aldermanus Balivi, et communitas "dicti. Burgi ad viginti annos elapsos, occupabant, absque

" innovatione aliqua, per eos, aut eorum successores, seu nos " aut successores nostros, in aliqua dictarum piscariarum, " fien in futurum."

The abbey of Kinloss and estates thereto belonging having been annexed to the Crown and afterwards dissolved by Act of Parliament, they were by charter erected into a temporal lordship, and were granted to Lord Edward Bruce of Kinloss, and to his heirs and assignees whatsoever. May 3, 1618.

The grant as to the fishings was in these terms, "cum salmo- " num piscariis super aqua de Findhorn."

The son of this Lord Bruce (Earl of Elgin) sold the abbey and abbey lands to Alexander Brodie of Lethen, the respondent's great-grandfather, whereupon he obtained several charters under the Great Seal granting to him, "Totum et " integrum monasterium et abbaciæ locum Kinloss, &c. Et " similiter totas et integras salmonum piscarias de qumque " stellis super aquam de Findhorn, subscript. quæ ab antiquo " ad dictam abbaciam de Kinloss pertinerunt, viz., Monki- " stell, Outwaterstell, Durstell, Caulstell, cum domo piscatoria " et horto ejusdem, et alliis privilegiis et pertinen. quibuscun- " que ad dictas salmonum piscarias pertinen. solit et con- " suet." 1643, 1644, and 1647.

The appellants having acquired right to all the fresh water fishings conveyed by the abbot in 1505 and 1539 to the town of Forres, and to Alexander Urquhart and William Wiseman, and also to Aithstell, and three-fourths of Elvinstell, on the west side of the river, as limited by the charter 1539, brought an action of declarator and damages against the respondent, charging him with several encroachments on their fishings; and *inter alia*, " that the said Alexander Brodie of Lethen and his " tacksman have only right to that species of fishing which is " known and distinguished by the name of stell net fishing, " and which is exercised by a coble and net, wrought by two " persons, the net so to be used not exceeding twenty-five " fathoms in length; that he has only right to five stells or " seats in the said river, and that these stells can only be " practised at particular times of the flood, that is to say, till " about half flood, which is called the flood stell, and there- " after about half ebb, which continues till low water, and is " called the ebb stell; and that the said defender and his " tacksman have no right to fish in any other manner, or " with nets of larger dimensions than what is above described, " and particularly, that they have no right to fish with " draught or harry water nets, or with hang nets set across

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"the said river; and that these hang nets are unlawful "engines reprobated by law; that the said Alexander Brodie "and his tacksman have no right or title to go beyond the "seat or place of his uppermost stell; that is, further up the "river than the usual and customary bounds of the said "uppermost stell, which ought to be fixed, marked, and "determined. And the said Alexander Brodie and his tacks- "man ought to desist from further encroachment."

The respondent stated the boundary of the appellants' fishings as described in their own titles as "Curren a lie Sloy- "pool usque ad introitum torrentis de Massett in mare sub "terris de lie West Grange de Kinloss."

The Lord Ordinary allowed to both parties a proof. A proof was accordingly taken and reported.

The result of that proof was stated thus:—That the respondent and his predecessors, had exclusively and without limitation as to the modes or times of fishing, possessed the whole salt water fishings on the east side of the river at all times of the tide, and the ebbs on the west, with the sand bed fishings on both sides of the river; that the appellant, Sir William Dunbar, occupied his two stells on the west side only in flood tides; and that the superior fresh water heritors had possessed the whole course of the river from Sloypool to Stockie Banks. The place between Stockie Banks and Binsness, as well as immediately below Binsness, appeared from the evidence, to be of little value, and scarce worth fishing; it was, therefore, in a manner, neglected by both parties; but, as the superior fishers had one of their best pools just at the beginning of this space, they sometimes fished downwards to Binsness. But the respondent's valuable fishings being at a greater distance, it did not appear that his people fished above Binsness.

This being the state of the proof, the present question then resolved itself into three points, 1st, What was the boundary between the *fresh* and *salt* water fishings? 2d, The alternate right of fishing Aithstell and Elvinstell, and 3d, How far the respondent was limited, in the exercise of his fishings, to the dimensions of the cobles, length of nets, number of hands and servants' wages, as formerly used and practised in these fishings; or if he was at liberty to make what improvement he thought proper in the mode of fishing, not contrary to public law?

Feb. 14, 1760. Upon argument on these three heads; the Lords of Session pronounced this interlocutor: "Find, that the pursuers have

" right to the whole fresh water fishings on the river Find-
" horn, from the Sloypool to the entry of the burn of Massett in
" the sea at high water, under the lands of the West Grange
" of Kinloss; Find, that the boundary of the fresh water fish-
" ings in the present course of the water of Findhorn, is
" where the river falls into the sea at high water in ordinary
" tides; Find, that the defender, Brodie of Lethen, has right
" to five stells on the east side of the river of Findhorn; that
" Sir William Dunbar has right to the two stells of Elvin
" and Aithstells, on the west side of the river; and that
" Lethen has the only right to fish on the sand beds, and on
" the east side of the river, at all times of the tide, and also
" upon the west side of the river, during the ebbing of the sea;
" and find, that the pursuer, Sir William Dunbar, and the
" defender, Lethen, are entitled to exercise their stell fishings
" without any limitations as to the dimensions of the cobles,
" length of nets, number of hands, or servants' wages, to be
" employed in the stell fishings, and decern and declare ac-
" cordingly."

Several reclaiming petitions were given in, but the Court adhered. The last of these prayed the Court to find that the respondent had no right to use raking or hang nets or draught nets upon the river Findhorn; and the Lords then pro- Jan. 5, 1762.
nounced this interlocutor: " Adhere to their former inter-
" locutor, and refuse the desire of the petition, and find the
" petitioners liable in expenses." Sir William Dunbar gave Jan. 22, 1762.
" in a fifth reclaiming petition, but the Lords adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of in the appeal be, and the same are hereby affirmed.

For the Appellants, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Tho. Miller, C. Yorke, Al. Wedderburn.*

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LORD ERSKINE, &c. v. MAGISTRATES OF STIRLING, &c.

[Fac. Coll., Vol. iii., p. 248; et Mor. 14,268.]

THOMAS, LORD ERSKINE of Alva, and JOHN ERSKINE of Balgownie, . . *Appellants;*

THE MAGISTRATES AND TOWN-COUNCIL OF STIRLING; MICHAEL POTTER of Easter Livylands, and ROBERT GALLOWAY of Burrowmeadow, . . } *Respondents.*

House of Lords, 20th March 1765.

SALMON FISHING IN THE FORTH—ACT 1698.—Held that the appellants were prohibited by the above Act from using a stoup-net, which was a species of pock-net, in their fishing salmon in the river or Firth of Forth, and that they were not entitled to use either pock-net or herrywater net, in said fishing, contrary to the said Act.

The river Forth takes its rise a considerable way to the west of the town of Stirling, where there is a bridge to which the tide flows; and the river is there navigable for small vessels; from thence it runs eastward for twenty-four miles by many windings, to the town of Alloa, which is only four miles distant by land; here it becomes navigable for large ships, and runs, increasing in breadth, mixed with salt water, until it is joined on the south bank by the River Carron, where it is lost in the sea, or Firth of Forth.

Royal Charters, 1620, 1699, 1741.

The appellant, Lord Erskine, was entitled by royal grants, "to the salmon fishings and other fishings whatsoever, in "and upon the river of Forth, descending from the Abbey "Boat of Cambuskenneth, to the mouth of the river Carron." This includes the space of twenty-five miles of the river, or thereabouts.

The other appellant, Mr Erskine, stood infeft in the lands of Poppletrees, lying in the barony of Cowie, and shire of

Jan. 4, 1598.

Stirling, "together with a stoup-net and fishing therewith, "upon and in the water of Forth, in the places used and

Sasine 1618.

"wont, or thereabouts, within the bounds of the said lands."

The respondents stated that, an Act of Parliament passed in 1698, against pock-net fishing upon the water of Forth, which prohibited all salmon fishing whatsoever in the Firth of Forth by such pock-nets, herrywater nets, or other engines, and appointed the Sheriff-principal of the county of Stirling, and the bailie of the water of Forth, to suppress said unlawful fishing.

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The appellants brought an action of declarator in the Court of Session, whereby, for themselves and other owners of salmon fisheries in this river, they insisted to have it found and declared that they had good and undoubted right to fish with pock-nets, herrywater nets, stoup-nets and cobles, and all other nets and engines whatsoever, not expressly discharged or prohibited by law.

The respondents, the Magistrates of Stirling, as owners of fisheries, and two others, also owners of the same, were cited to this action.

The defence stated by the respondents was, that the words of the Act did comprehend the appellants' fishings, and the mode of fishing by pock-net and herrywater nets, and, therefore, that their fishings by stoup-net were prohibited.

Feb. 25, 1763.

The Lords found "the Act of Parliament, 1698, is general, "regulating the fishing in the River Forth, and that the "stoup-net being a species of pock-net, is within the pro- "hibition of the Act, and that the pursuers (appellants), and "all the heritors, are debarred by the said Act from fishing "in the said river, above the Pow of Alloa, with pock-nets, "stoup-nets, or herrywater nets, and assoilzie from that "branch of the declarator and decern."

July 14, 1763. Feb. 11, 1764.

On reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Tho. Miller, C. Yorke.*

For the Respondents, *Fl. Norton, Al. Forrester.*

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BRODIE v. GRANT, &c.

ALEXANDER BRODIE, Esq. of Lethen, . *Appellant;*

SIR LUDOVICK GRANT of Grant, Bart.; SIR ALEXANDER GRANT of Dalvey; SIR WILLIAM DUNBAR, Bart., and Others, } *Respondents.*

House of Lords, 25th April 1769.

SALMON FISHINGS.—The boundary which divided the appellant's

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salt water fishings from the respondents' fresh water fishings on the River Findhorn, ascertained and fixed.

The present appeal arises out of the circumstances of the former appeal regarding the boundary between the salt water fishings upon the River Findhorn, belonging to the appellant, and the fresh water fishings of that river, belonging to the respondents.

Ante, p. 769.

The Court, in the former proceedings, had previously ordered a survey to be made, by an engineer, of the course of the river, and of the tide.

Accordingly, such survey, with the plan of the river and of the flowings of the tide, was made and reported upon oath, by Mr Peter Mey, named on the part of the respondents.

In making this survey, Mr Peter Mey was attended by both parties; and the accuracy of his plan, it was stated, had never once been questioned in the course of the former cause.

By this plan, the river falls into the sea at high water, in ordinary tides, at a place called the Banks of Cultyre.

The former decree had proceeded upon this plan, and the same was before the House of Lords, when that decree was affirmed.

But, instead of obeying the former decree, the respondents kept forcible possession of the fishing upon a large tract of the River Findhorn, below the boundary settled by the decree, and also by repeated acts of violence, prevented the appellant from exercising his undoubted right of fishing within that tract for three years from 1762 till April 1765, some months after the decree of the Court of Session had been affirmed by the House of Lords.

The appellant thereupon brought the present action for asserting his right, and sought reparation for the damage done him by this forcible possession and violence.

This action was raised in August 1762, and in November following, the present respondents brought their appeal to your Lordships, against the foresaid decree, settling the boundary between the fresh and salt water fishings.

As the judgment upon this appeal was a simple affirmance of the decree of the Court of Session, the only question that can possibly arise upon that decree in the present cause is,—Whether the line of the boundary thereby given, was sufficiently marked out in the decree; and if it was not, What is that line? and, consequently, supersedes the necessity

of entering into the matter of right previously declared by the decree of the Court of Session, and affirmed by the House of Lords. (Here the history of the fishings, and the procedure in the former appeal, was fully set forth.)

Pending the discussion of that appeal, some proceedings were had in the action of molestation and damages; and the Court pronounced this interlocutor:—"Having advised the Nov. 18, 1766.
"state of the process, &c., and having also considered the
"proceedings in the former cause, and particularly the decreet
"pronounced therein, which fixes the rule whereby the line
"or boundary of the defenders' fishings falls to be ascertained,
"and that the pursuer extracted the decreet without making
"any application to the Court for having such line or boun-
"dary fixed. Therefore, sustain the defences, assoilzie the
"defenders from this action, and decern; reserving to either
"party to ascertain that line as they shall be advised." The defenders (respondents) reclaimed against this interlocutor; and it was at this stage that they brought an action of reduction for setting aside the former decree of the Court with the judgment of the House of Lords, and for declaring it null and void. In virtue of the former decree, the appellant had begun to fish in the pools of Cultyre and Stockiebank, which the respondents had voluntarily surrendered to him two years before; but having attempted to take back these fishings, the appellant brought an interdict. By interlocutor of this date, he Mar. 11, 1767.
was continued in possession of the fishings of Cultyre. Thereafter, upon advising the whole conjoined processes, the Lords pronounced this interlocutor:—"Adhere to their former inter- Nov. 18, 1767.
"locutor, and refuse the desire of the petition, in so far as it re-
"claims against the same, and repel the reasons of reduction
"at the defenders' instance, and assoilzies the petitioners there-
"from, and decern and ordain both parties, on or before the 1st
"day of December, to give into their boxes memorials upon
"the manner of ascertaining the boundaries of their fishings."

The Court, on the merits of the cause, pronounced this interlocutor:—"The Lords having resumed consideration of Jan. 28, 1768.
"the cause, with the plans or surveys of the fishings in question,
"and the notes or observations of Peter Mey, the surveyor
"thereupon; and having advised the memorials for the
"parties, upon the manner of ascertaining the boundaries
"of the fresh water fishings belonging to the defenders, they
"find the boundary of the fresh water fishings, that is, the
"place where the River Findhorn falls into the sea at high
"water, in ordinary tides, to be at that place or point on

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"the last plan or survey drawn by the said Peter Mey, and "given into process by special order of Court,—marked with "the dotted ink line, shaded about with red, as it crosses or "intersects the river at figure (6) on the east side of the "river, below the Pool of Stockiebanks, and opposite to the "middle of what is marked or delineated the Inch, upon the "west side of the river, below the Pool of Stockiebanks, "and opposite to the middle of what is marked or delineated "the Inch, upon the west side of the river; and which place "or point is marked by the Lord President, of this date, as "relative hereto; and decern and declare the same to be "the boundary of the said fresh water fishings, in time com-"ing: And the Lords appoint the said plan marked as afore-"said, to remain amongst the grounds and warrants of this "decreet in all time coming; and remit to the Sheriff-"depute of the shire of Elgin and Forres, or his substitute, "to set up proper marks on each side of the river, ascertain-"ing the boundary of the said fishings, to be as above de-"scribed."

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged, that the said interlocutors of the 18th November 1766, and 18th November 1767, be affirmed. And it is hereby further ordered, that in the interlocutor of 28th January 1768, after the words ("ordinary tides to be"), the words ("at that place or "point on the last plan or survey drawn by the said "Peter Mey, and given into process by special order of "Court, marked with the dotted ink lines shaded about "with red, as it crosses or intersects the river at figure "(6) on the east side of the river, below the Pool of "Stockiebanks, and opposite to the middle of what is "marked or delineated the Inch, upon the west side of "the river, and which place or point is marked by the "Lord President, of this date, as relative hereto"), be left out, and that the words ("at the points according "to the sketch No. I., upon the plan made by order of "the Court of Session") be inserted; and that after the word ("and") the words ("upon the admission of the "appellant in this cause at the bar") be inserted; and that after the words ("decern and declareth"), the words ("same to be the") be left out; and that after the words

("in time coming,") the words ("to be a line drawn "upon the north-west point of the banks of Cultyre, "across the channel of the river, through the middle of "Nicol Young's hillock, so far as to include below it a "part of the pool of Cultyre, and, of course, the whole "pool of Stockiebanks, and every other part of the "river below Cultyre") be inserted; and that after the word ("and") the words ("the lands") be left out; and that after the word ("plan") and before the word ("mark"), the words ("to be") be inserted; and that after the word ("marked"), the words ("as aforesaid") be left out; and that the words ("by the Lord President "of the Court of Session as relative hereto, and") be inserted. And it is hereby further ordered and adjudged, that this interlocutor, thus varied, be, and the same is hereby affirmed.

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BRODIE v. GRANT, &c.

For the Appellant, *C. Yorke, Al. Wedderburn, Ilay Campbell.*

For the Respondents, *Ja. Montgomery, Al. Forrester.*

SIR LUDOVICK GRANT, &c., . . *Appellants;*

ALEXANDER BRODIE, Esq., . . *Respondent.*

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House of Lords, 25th April 1769.

This was a dispute about the right to the mussel-scalps in the river Findhorn.

A grant from the Crown to Ross of Kilravock, of the mussel-scalps in the River Findhorn, which is a public river, supported by long possession, was preferred before a similar grant of later date, in favour of the appellants.

For the Appellants, *Ja. Montgomery, Al. Forrester.*

For the Respondent, *C. Yorke, Alex. Wedderburn.*

JEAN MURRAY, otherwise CARLYLE, of Locharthur, and Husband, . . *Appellants;*

GEORGE CARLYLE, Son of the deceased THOMAS CARLYLE, in Travala, in Wales, *Respondent.*

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MURRAY, &c. v. CARLYLE.

1770. House of Lords, 21st February 1770.

MURRAY, &C. v. CARLYLE. DEED—CONSTRUCTION—CONDITIONS.—A marriage-contract, although absurd, and inconsistent in some of its clauses, yet, as it was clear in the destination clause, it was sustained.

The estate of Locharthur, lying in the stewartry of Kirkcudbright, in Scotland, was originally an unlimited fee devised to heirs-general.

In 1736, an ante-nuptial contract of marriage was entered into between William Carlyle, the then proprietor, and Agnes Maxwell, whereby she was provided with a certain jointure. And it was specially provided and declared, "That in case "there shall be heirs male procreated and existing of the said "future marriage at the dissolution thereof, they shall succeed to the said William Carlyle, in his four merkland of "Locharthur, and lands of Halmyre; and failing thereof, the "eldest heir female of the said future marriage, with this express provision, that she marry legally with the lawful "next in blood and kindred of the name of Carlyle; and "failing heirs female, the heirs male of Michael Carlyle, in "Boreland, his brother-german; which failing, the said "Michael Carlyle, his heirs female, with the foresaid express "provision in the case of heirs female in this future marriage; "and failing thereof the said William Carlyle, his own "sisters-german, and their children; all which failing, the "said William Carlyle, his own nearest heirs and assignees "whatsoever."

In 1743, William Carlyle made the following settlement, after making provision for his wife: "Moreover the said "William Carlyle hereby binds and obliges himself and his "heirs whatsomever, to provide and secure the four-merk "land of Locharthur, lying in the parish of Newabbey, and "stewartry of Kirkcudbright, and the foresaid lands of "Halmyre, in favour of the eldest heir male, to be procreate "of this present marriage, and his heirs; which failing, the "eldest heir female thereof, and her heirs, with this express "provision, that she marry legally with the lawful next in "blood and kindred of the name of Carlyle; which failing "in the eldest, then the second, if any be, or any succeeding "daughter of this present marriage, is hereby appointed to "succeed, such always being obliged to marry in the above-"mentioned manner; if otherwise, they are hereby debarred "from the succession, and appointed to receive only such "suitable and competent portions, determined by friends on

" both sides, as will consist with the state and standing of " the family: Further, failing heirs, both male and female of " this present marriage that is here appointed legally to suc- " ceed the eldest heir male of Michael Carlyle, in Boreland, " of Southwick, his brother-german, and his heirs; which " failing, the said Michael Carlyle, his heir male then is here- " by appointed to succeed his heir female with the foresaid " express provision above-mentioned in the case of heirs " female; all which failing, the said William Carlyle and his " said brother, in above-mentioned manner, then therefore " legally succeed, and by these presents are ordered and ap- " pointed lawfully to succeed, the said William Carlyle, his " own next and nearest heirs male in blood and kindred of " the name of Carlyle, with the express restrictions, provi- " sions, and limitations, to them and their heirs male and " female only, in above-mentioned and underwritten way, " and the manner of succeeding, and no otherwise, for divine " duties sake, and for conservation of what worldly estate and " interest is or may be in the family, still with the lawful " next in blood and kindred into the name and family of " Carlyle: And, moreover, without prejudice to the above " provisions and conditions, it is hereby expressly provided " and appointed, that whichsoever of the foresaid heirs it " shall happen to succeed, by virtue of the foresaid order and " substitution, shall be of pure and true Presbyterial prin- " ciple and practice, according to the Word of God, and " purest Reformation of the truly Covenanted Presbyterial " Church of Christ in Scotland, and no otherwise, who upon " their failing to be, or not continuing such in principle and " practice, were it in his own son, then therefore the next in " blood and kindred of the name of Carlyle, who is of pure " and true Presbyterial principle and practice, shall succeed " by their destination; wherefore all are hereby declared, " who are not of the said pure and true Presbyterial prin- " ciple and practice, *eo ipso*, to lose and forfeit the benefit of " the above-mentioned succession, and the same is appointed " to devolve on the next heir substitute that is of such pure " and true Presbyterial principle and practice, who is there- " upon hereby authorised immediately after such failure, to " serve heir, and to enter into the possession foresaid, and " that without being liable for the debts or deeds of the " person so failing and contravening."

William Carlyle never had any issue of this marriage. His brother Michael had a son, who was treated as the heir, and

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on his death, the appellant, who was a daughter of William Carlyle's only sister, was taken into his family. William Carlyle died in 1751, and Michael succeeded his brother in the estate.

Michael possessed the estate until 1763, when he died, and the deceased's estate was then taken possession of by the appellant as an heir female, until the respondent came forward and laid claim to the estates as nearest heir male of William Carlyle.

Jan. 28, 1768. Having brought his action of declarator, claiming the estates as nearest heir male, decree in absence was allowed to

June 26, 1768. go out by default. On representation, the Lord Ordinary

July 26, 1768. adhered, and of this date, he found that the succession of the lands of Locharthur devolved "upon the pursuer (respondent), as nearest heir male and of provision to the deceased "William Carlyle of Locharthur in virtue of the contract of "marriage, dated 21st Oct. 1743."

In a reclaiming petition to the Court, the appellant contended, 1st, That the deed claimed upon by the respondent, was irrational, and in many of the articles, impossible to be carried into execution, and, therefore, ought to be totally disregarded. That it was, in many respects, unintelligible, absurd, and impossible to be carried into execution, because the granter obliged himself to infeft his wife for life in Halmyre, and in another part of the deed he immediately conveys these lands of Halmyre to his heirs male. 2d, The deed contained a limitation to the heirs of the marriage, and their heirs—remainder to the heirs of Michael Carlyle. By these limitations, if William Carlyle, the granter, had a child surviving him, and dying without issue, Michael Carlyle would have taken the succession, as heir to such child, but if William, the granter, had died without any child, then Michael himself was excluded by his own child, who would have taken under the second limitation.

Dec. 3, 1768. The Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellants, *Al. Wedderburn, Tho. Lockhart.*

For the Respondents, *J. Montgomery, H. Dalrymple.*

WILLIAM HUTCHISON, late Merchant in Leith, ... *Appellant.*

THE REPRESENTATIVES of JAMES YOUNG and Dr ROBERT MACKINLAY, . . *Respondents.*

House of Lords, 15th February 1771.

ADJUDICATION—DECREE OF EXPIRY OF THE LEGAL—PLURIS PETITIO.—Held it incompetent to reduce a decree of expiry of the legal of an adjudication to which the objection of *pluris petitio* was stated, to the effect of redeeming the lands from a purchaser, but that it was competent to open up the same to the effect of making the adjudger and seller of the lands account for the price received.

The appellant purchased for £366, 13s. 4d. sterling, a farm called *Woodside*, having a coal-mine in it.

On 11th February, the appellant borrowed from Allan Lockhart £155, 1s. 1½d., for which he gave him an heritable bond upon this estate.

In February 1742, he paid Mr Lockhart £15, 11s. 1d., per receipt; being two years' interest on his bond.

Upon this bond Lockhart adjudged the appellant's lands of Woodside, for the accumulated sum of £204, 10s., giving credit only for £12, received on account, instead of £15, 11s. 1½d.

Thereafter, the appellant borrowed a further sum of £60 sterling upon his bond, 10th December 1744; and some time thereafter the appellant made payment to Lockhart of the sum of £44, 5s. on account.

Upon this last mentioned bond, Lockhart obtained an adjudication of the lands of Woodside for the accumulated sum of £85, 5s., so that of £215, 11s. 1d., the amount of the whole original sums borrowed from Mr Lockhart, £44 having been paid by the appellant to account, there only remained, the appellant stated, a debt of £171, 6s. 1d. charged by the adjudication upon the estate for which the appellant had paid the purchase money of £366, 13s. 4d., and had laid out as much more on improvements.

James Shearer acquired right from Lockhart to these two adjudications; and he subsequently managed to obtain a lease of these lands from the appellant's brother in favour of one Gordon, but he being ejected from possession, Shearer then procured possession of the lands under his adjudication.

In January 1754, he brought an action of declarator

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against the appellant for having the legal of the first-mentioned adjudication, declared to be expired.

The appellant, on his part, brought an action for count and reckoning against Shearer, and for reducing his adjudication and debts. These two actions were conjoined, and of this

Jan. 21, 1758. date, it was found that Shearer was not entitled to decree of expiry of the legal.

Thereafter, however, the respondent obtained decree decerning "in the declarator of the expiration of the legal in "terms of the libel, and assoilzies the said James Shearer "from Hutchison's reduction and haill conclusions thereof,

June 22, 1758. "and decerns."

The lands were then sold to James Young; and in a few years thereafter they were again sold to the other respondent, Dr Mackinlay.

The appellant then brought the present action of reduction of the above decree, stating the following reasons:—1st, That Lockhart, the original creditor, having neglected to give credit for the whole of the payments received by him, a *pluris petitio* rendered the adjudication unavailable to be the ground of an expired legal, it being an established rule of law, that adjudications liable to the objection of a *pluris petitio*, though permitted to stand as a security for principal and interest, are held to be unavailable for carrying off the absolute ownership of an estate upon decree of an expired legal. 2d, That the appellant had suffered great loss by the lease impetrated from his mother to Gordon, Shearer's confident, because the lands were let at a rent far below their value. 3d, By the interlocutor of the Court of 20th January 1758, finding Shearer not entitled to the benefit of an expired legal, and that the appellant had right to redeem his lands upon payment of the sums that should be found due to Shearer, he had a clear right to open up the decree of expiry of the legal, if not to the effect of redeeming the lands, at least to the effect of making his heirs account for the price at which the lands were sold to Mr Young.

Dec. 1, 1768. The Court, of this date, pronounced this interlocutor: "Find that it is not competent to open up the decree of de-"clarator of the expiry of the legal of the lands of Woodside, "in the year 1758, in so far as it concerns the interest of Dr "Mackinlay, the last purchaser; but find it competent to "open up the said decreet *ad hunc effectum*, to make the heirs "of James Shearer liable to account to the appellant for the "price at which the lands in question were sold to James

1771.

HUTCHISON v. REPRESENTATIVES OF JAMES YOUNG, &c. Feb. 9, 1769.

"Young, and remit to the Lord Ordinary to proceed accordingly. On reclaiming petition, the Court adhered.

From these interlocutors, so far as they refused to open up the decree under reduction as to the interest of Dr Mackinlay and James Young, and so far as they did not find the appellant entitled to redeem and recover his estate, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Jas. Williamson, Robt. Mc Queen, H. Dalrymple, Jas. Boswell.*

For the Respondents, *Al. Wedderburn.*

1772.

MACCULLOCH, &c. v. MACCULLOCH.

[Barholm Entail. Hailes, Dec., Vol. i., p. 432.]

JAMES DEWAR, Esq. of Vogrie; JOHN MACCULLOCH, the Elder; and JOHN MACCULLOCH, the Younger of Barholm, *Appellants.*

JEAN MACCULLOCH, eldest Daughter of the said John Macculloch of Barholm, the Elder, *Respondent.*

House of Lords, 18th May 1772.

ENTAIL—REVOCATION—CONTRACT AND DISCHARGE.—John Macculloch executed an entail in favour of himself in liferent, and John Macculloch, the younger, his eldest son, and the heirs-male of his body; remainder to the heirs-female of his body; and remainder to other heirs-male named. The entail was recorded, and charter and infeftment followed upon it. Some time thereafter, he, with consent of his son, revoked this entail and sold the estate. Held that the father and son could not, by their joint act and deed of revocation, recall and rescind the entail, or sell the estate of Barholm.

1762.

John Macculloch the elder, executed an entail in 1762, of the estate of Barholm in favour of himself for life, and to John Macculloch the younger, his eldest lawful son, and the heirs-male of his body; remainder to the heirs-female of his body, remainder to William Macculloch, his second lawful son, and the heirs-male of his body, and this entail was duly recorded, and charter and infeftment followed.

1751.

There had been a previous entail (1742), but which was brought under reduction; and by a contract in 1751, between John Macculloch of Barholm, on the one part, and Isobel

1772.

MACCULLOCH, &C. v. MACCULLOCH.

Gordon, a sister of Mr Macculloch, with consent of her husband, William Gordon, for themselves and children, on the other part, it was agreed under certain conditions specified, that Isobel (who was the next heir of entail), should not oppose the reduction of the entail 1742, and one of these conditions was, that John Macculloch should execute a new entail in favour of his own issue and their heirs, whom failing, to Isobel and her heirs.

The appellants, John Macculloch, elder and younger, being advised, that by their joint act and consent, they might revoke the entail made by them in 1762, and sell and burden the estate, they of this date, executed a revocation of the entail, and conveyed the same to James Dewar of Vogrie, the other appellant, in trust, in the first place, for selling a part of the estate for payment of the debts; and, in the next place, to settle the remainder upon the same series of heirs, and to the same uses and purposes as in the entail 1762.

Dec. 2, 1769.

Alexander Gordon, the eldest son of Isobel Gordon, as one of the heirs of entail, brought an action against the appellants for voiding the said revocation and conveyance, and instrument of sasine following thereon. The appellants brought a counter action against the said Alexander Gordon and the other heirs of entail, now existing, for the purpose of having it found and declared that the appellants, John Macculloch, elder and younger, could, by their joint act and deed, *revoke* or *recall* the entail, and sell and dispose of the estate. A third action was also brought at the suit of the appellant, James Dewar, against William Gordon, only child of the aforesaid Alexander Gordon, for declaring that the entail was effectively revoked. These three actions were conjoined; and the Lord Ordinary reported the cause to the Court on memorials.

It was contended by the appellants; 1st, That where a person executes an entail, settling the fee upon the institute, and reserving his own liferent, it is in the power of the maker of such entail, with consent of the institute, to revoke or alter such entail.

2d, That the contract entered into between John Macculloch the elder, and his sister in 1751, cannot bar him and his son from exercising such power of revocation, as it was in effect no more than a promise to settle without an onerous cause, and the terms of that agreement were counteracted by the opposition made to the reduction; in which, notwithstanding, the appellant prevailed.

The Court pronounced the following interlocutor:—"On "report of Lord Stonefield, Ordinary, and having advised

" the memorials of both parties, *hinc inde*, and heard parties' " procurators in their own presence thereon, and also advised " the further memorials for both parties upon the said debate, " the Lords sustain the reasons of reduction of the revoca- " tion made by Mr Macculloch, the elder and younger, of Jan. 25, 1772. " Barholm, of the deed of entail of the estate of Barholm " made by Mr Macculloch, the elder, in the year 1762; and " of the disposition of the said estate, made by them to Mr " James Dewar, in consequence of the said revocation and " infeftment thereon; and, further, they assoilzie Mr Gordon " of Culvenan, and the other defenders in the processes of " declarator at Mr Dewar's instance, from the said several " processes, and decern accordingly."*

After this, judgment was pronounced, Gordon of Culvenan, for himself and infant son, and for his brothers and sisters, executed a revocation and discharge of the contract 1751, in which they consented to the sale of the estate. But the respondent, Jean Macculloch, then appeared in the action, and gave in a reclaiming petition, insisting that the entail could *not* be put an end to by the joint act of the liferenter and fiar. The Lords then pronounced this interlocutor: " In respect of Aug. 3, 1771. " the discharge and renunciation now produced: Find the de- " creet of reduction formerly pronounced falls for defect of a " pursuer. But as to the processes of declarator, sustain the " defence pleaded for Jean Macculloch, refuse to declare in " terms thereof, assoilzie, and decern."

Against the interlocutors of 25th January and 3d August 1771, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Where settlements are made and delivered to the grantee during the granter's life, it is in the power of them jointly to revoke, alter, and change these settlements. Where such settlements are made with remainders over to remote heirs, and with limitations and prohibitions, they are of the nature of contracts between the granter and grantee. The grantee is bound to the granter so long as he lives, solely for the performance of the condi-

* NOTE.—The Court, in giving the above judgment, proceeded principally on the first point. On the second point, they seemed to be of opinion that the contract 1751, being a mutual one between John Macculloch, the elder, and his sister and her children, he was thereby barred from doing any act contrary to the covenants of that contract, to the prejudice of her and her issue. For opinions of Judges *vide* Hailes, Dec., vol. i., p 432.

1772.

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tions in the settlement; the remoter remainder men have no action against him, so long as the granter lives, who may release him from the conditions and obligations of the settlement, and to whom he may surrender the estate he has received. After the granter's death, the grantee becomes bound to all the remote remainder men to perform and observe the limitations of the settlement, having taken and accepted the estate under these conditions.

2d, The entail in question was made by John Macculloch, the elder, to himself for life, and to John Macculloch, the younger, in fee, with several remainders over, and under several limitations. The granter was under no restriction not to alter; and he and the grantee are both alive, and have jointly revoked this entail, which revocation is valid, agreeable to the principles of the law of Scotland, as well as the decisions of the Court of Session, affirmed by your Lordships.

3d, It does not vary the case, that infeftment was taken on this entail; for, as the law considers the grantee bound solely to the granter during his life, the infeftment will not make that contract broader than it was before. Infeftment upon an entail respects solely the security of creditors, but has no operation whatever in questions between the heirs of entail themselves. There was a charter and infeftment in the case of the Earl of Moray *against* Ross of Balnagown, 17th November 1743, quoted by the appellant, but your Lordships gave no effect to that.

Vide infra, p. 801.

4th, The respondent, Jean Macculloch, is no creditor under the contract 1751; she is no party to it; she is not bound to do or perform any act, nor does any person undertake for her. The party on the one side is John Macculloch, the elder, *solely*. The party on the other side, is Isobel Gordon and her children. These last have all of them released their interest, and discharged the contract, which must now be considered as dissolved and annihilated.

5th, On the supposition that the respondent was a party to the contract, she has forfeited every right or interest she could have claimed under it. The great object was to avoid and set aside old Macculloch's settlements, and the whole parties were taken bound not to give any obstruction or opposition to the action raised by the appellant, John Macculloch, the elder, for that purpose; but the respondent did, in fact, by the aid of her grandmother, give every possible opposition to that suit.

Pleaded for the Respondent.—1st, The appellant, John Macculloch, elder, being, by the entail of 1762, which was

not a voluntary act of his, but a deed executed in consequence of the contracts 1751, reduced to the state of a liferenter, he could not thereafter, either with or without the fiar's joining with him, revoke or annul the entail to the prejudice of the substitutes or persons appointed to take in remainder; and, supposing such power competent when the entail remained personal and incomplete, yet, when recorded in every way required by the Act 1685, relative to entails, there was such a *jus quæsitum* created to the heirs of entail, as could be defeated by no after deed or transaction, and which is corroborated by the inhibition raised upon the contract 1751.

2d, It is an undeniable proposition, that any person who is not under a legal disability, may bind himself personally to the performance of any lawful obligation in favour of any third person, and subject his estate to whatever lawful limitations and conditions he pleases; and the *jus quæsitum*, or right thereby accruing or arising to such third parties, cannot, by any after deed, be revoked or annulled. It is not denied that such would have been the law had John Macculloch, elder, pretended to do this of himself, without the concurrence of his son, the fiar; but the respondent maintains, that as John Macculloch, elder, was reduced to the state of a liferenter, he could neither by himself, nor in concurrence with the fiar, do any thing to the prejudice of the entail; for the fiar being bound, in the strictest manner, to do no deed to the prejudice of the remoter heirs, who, each in their order, have an equal right with himself, it is inconceivable how the junction of these two, the one having no right, the other a limited one, should create a right which had no prior existence; and so it was decided in the case of Sharp *v.* Sharp, 17th January 1631 (Mor. 15,562), and Innes *v.* Innes, 31st December 1695 (Mor. 15,566). The case of Balnagown hinged on specialities. The contract or agreement 1751, was not personal to Isobel Gordon, she having contracted for herself and all the heirs of entail; and her right not being better or stronger than that of any of them, except standing nearer in order of succession; the discharge, therefore, granted by her of the contract 1751, can be of no avail.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Jas. Montgomery, Al. Wedderburn.*

For the Respondent, *John Dalrymple, Thomas Lockhart.*

1773.

LIVINGSTON v. WARROCK.

[Fac. Coll., Vol. iv., p. 313; et Mor., p. 7847.]

ALEXANDER LIVINGSTON, Esq., . . *Appellant;*
JAMES WARROCK, ... *Respondent.*

House of Lords, 29th April 1773.

ENTAIL—JUS TERTII.—In the entail of the estate of Westquarter, the question was, Whether James Livingston could sell the estate, under the following destination of the entail, "to "and in favour of the said Countess, and James, Earl of Find- "later, her husband, and longest liver of them two, for the "Earl, his liferent use allenarly, and to James Livingston and "the heirs male of his body, whom failing, to his heirs male "whatsoever?" James Livingston was, by express clause, prohibited from selling; and in a former appeal it was found he could not sell (*vide ante* vol. II., p. 108.) This was a part of the estate which, from the state of the title, it was thought he could sell; and it having been sold, the next heir after his death brought a reduction. Held, that where the title of two parties is derived from one author, neither party can object to the right of the common author.

The Countess Dowager of Callender was married a second time to Sir James Livingston, and afterwards to the Earl of Findlater.

By the former marriage, she was settled in the liferent of Sir James' estate of Westquarter, remainder to the heirs of the marriage.

There were no heirs of the marriage; and, on Sir James' death, Lady Newton succeeded to the estate of Westquarter, and she and her husband conveyed the same to the Countess, now married to the Earl of Findlater.

The Countess then, 1705, with consent of her husband, executed an entail of the estate, "to and in favour of the said "Countess and James, Earl of Findlater, her husband, and "longest liver of them two, for the Earl, his liferent use "allenarly; and to James Livingston, third son of Alexander "Livingston of Bedlormie, and the heirs male procreate or "to be procreate of his body; which failing, to his other heirs "male whatsoever, which failing, to such person or persons "as the Countess should nominate and appoint, by a writ "under her hand at any time during her life."

After the Countess' death, charter and infeftment was obtained, proceeding on the deed of entail.

James Livingston's father devised a scheme, which had for its object the defeating of the entail and the sale of the estate; and, accordingly, part of this estate was sold to a Mr Henderson, and by him to the respondent.

The appellant's uncle then brought an action to set aside the sale, on the ground that James Livingston was barred from selling these lands, as they were settled in strict entail by the deed of entail executed by the Countess as above set forth. This action was, after his uncle's death, carried on by the appellant.

In defence, the respondent pleaded, 1st, That the lands conveyed to Andrew Henderson were not comprehended under the entail, neither could they, as they never belonged to the Countess, to whom the pursuer had served, but were a fee simple estate in the person of James Livingston, and might be sold by him at pleasure. 2d, As both parties derived right from the same author, the appellant could not be heard to object to the right of the common author.

The Court, after much discussion, pronounced this interlocutor:—"Sustain the defence, assoilzie the defender, and "decern."* Nov. 18, 1772.

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* Opinions of the judges:—

Lord Coalston.—"Both parties derive right from Lady Callender. Neither of them can object to the author's right. Had the objection been made by the heirs male, it would have been good; but then the defence of prescription would have been good. The party here cannot plead in the right of the heir male, without being liable to the same defence as *he* would have been. If the defender may object to Lady Callender's right, by parity of reason, he may object to a progress of 1000 years."

Lord Monboddo.—"If a person is in the course of usucapion, he may maintain his right against every one who is not *verus dominus;* it is, therefore, material to inquire into the right of Sir James Livingston and Lady Newton. If the fact is true, that the lands are not in the charter of adjudication, then the pursuer has not proved that he is the *verus dominus*, and the subject is still in *hæreditate jacente* of James Livingston."

Lord Auchenleck.—"It is not competent for the defender to say that James Livingston had no right himself, and, therefore, could not sell to me. How can he dispute the right of the person from whom he himself derives right?"

Lord President.—"I always understood it to be a fixed rule that no one can object to his author's right."—*Hailes*, vol. i., p. 230.

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LIVINGSTON v. WARROCK.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *E. Thurlow, Ja. Montgomery.*

For the Respondent, *Al. Wedderburn, A. Crosbie.*

1774.

LESLIE v. LESLIE, &c.

The Honourable ANDREW LESLIE, . *Appellant;*

LADY JANE ELIZABETH LESLIE, and her Husband, LUCAS PEPYS, Esq., . . *Respondents.*

House of Lords, 10th May 1774.

ENTAIL—DESTINATION—HEIRS MALE—HEIR FEMALE.—In an entail the destination was "to John, Lord Leslie, and the heirs "male, *or* eldest heir female, lawfully to be procreated of his "body." The respondent was the eldest heir female, and heir-at-law, and heir portioner with her sister, both being granddaughters of Lord John Leslie. The appellant was their uncle, who was the heir male of the body of Lord John Leslie, but not the heir general. Held, that by the above destination, the eldest heir female in the lineal or legal order of descent, was to be preferred to the collateral heir male of the body.

A question here arose upon the investitures of the estate of Rothes, which appeared at one time to have been in favour of heirs male. The appellant claimed to succeed under an entail 1684, and the respondent claimed to succeed as one of the heirs called under her father and mother's contract of marriage, and also as granddaughter of the maker of the entail under the destination therein, and above quoted.

It was pleaded by the respondent, in the first place, that the entail 1684, not having been recorded in the register of entails as required by the Act 1685, the same was not good against creditors; and that she being one of the heirs called under her father and mother's contract of marriage, was to be considered as a creditor, marriage contracts, and the provisions therein contained being in their nature onerous, and such as ought not to be affected by an unregistered entail. 2d, That, independent of her right under the marriage contract, Lady Jane was the heir called by the entail 1684, in preference to her uncle, the appellant, the destination to John, Lord Leslie, "and the heirs male, or the

"eldest heir female lawfully to be procreated of his body," being synonymous with heirs whatsoever of his body in the legal and lineal course of succession, with a preference only to the eldest heir female in case of the succession opening to daughters, or other heirs portioners, and, consequently, that Lady Jane and her sister, being the heirs general or heirs-at-law of their grandfather, John, Lord Leslie, Lady Jane, as the eldest, must succeed under the entail, and must take in preference to her uncle, the appellant, who is indeed the heir male of John, Lord Leslie's body, but not the heir general.

It was pleaded for the appellant, in the first place, as to the contract of marriage, that holding him to be the heir called under the entail 1684, in the event which has happened, his right could not possibly be defeated by any provision or settlement, which his elder brother, one of the heirs in that entail, might think proper to make upon his issue in his contract of marriage. Where an estate, supposing it to be a fee simple in the father's person, is provided to the heirs of a marriage, these heirs must take the estate, as representing their father, and must be subject to all its anterior engagements, and even to his posterior ones, unless they be gratuitous and *in fraudem* of the provision, in which case alone, the heirs of the marriage are considered as creditors to the effect of reducing such posterior gratuitous deeds done by the father to their prejudice.

2d, As the competition must, therefore, entirely rest upon the import of the entail 1684; and as both parties claim under the words of substitution to John, Lord Leslie, the eldest son of the Countess, who made the entail, the question is, Whether these words, viz. "the heirs male or the eldest "heir female, lawfully to be procreated of his body," do in sound sense and in the meaning of the granter, imply an entailed succession, first to the heirs male of Lord Leslie's body, and thereafter to his heirs female? or, if they must be held as importing the lineal succession of heirs whatsoever, or heirs general descending of his body? The appellant contended, that every circumstance appearing on the face of the deed, as well as the strain of the family settlements, clearly tended to the former construction; and that this was also the natural and obvious meaning of the words. If heirs in the legal course had been intended, he had no occasion to divide them into male and female; for the word *heirs* would have comprehended both; but he calls the heirs male of Lord Leslie's body, or the eldest heir female of his own body, mean-

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ing the one before the other; and the *quæquidem* of the charter, clearly points out this to have been the writer's intention, as it respects the substitution, by the above general description, of "heirs male, and of tailzie," &c. The word *or*, will not bring in the heirs female equally with, or preferably to, the heirs male, but only in the next place after them; and it is a mistake in the respondent to argue, that if the heirs female are not brought in according to the legal order of succession, they will be excluded altogether.

March 4, 1774. The Court of Session pronounced this interlocutor: "In the "competition of Brieves, depending before the Macers of the "Court of Session, &c.; the Lords, on report of Lord Stone-"field, one of the assessors appointed by this Court in the above "competition; and having advised the informations of both "parties, with the writs produced, together with the mutual "processes of declarator raised by the said parties, and conclu-"sions of reduction at the said Mr Andrew Leslie's instance, "they conjoin the said mutual processes, and allow them to "be repeated in the said competition; and upon the merits of "the cause, Find that the said Lady Jane Elizabeth Leslie is "entitled to take and hold the estate of Rothes in question, "and to be served heir in special therein, in preference to "the said Mr Andrew Leslie, the heir male, assoilzie her "from the reduction and declarator at his instance, and "decern. And they further remit to the Macers of the "Court to dismiss the Brieves raised by him, the said Mr "Andrew Leslie; and to proceed in the service of the said "Lady Jane Elizabeth Leslie, as heir in the said estate, as "above-mentioned."

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellant, *E. Thurlow, Henry Dundas.*

For the Respondents, *Ja. Montgomery, Al. Wedderburn, Alex. Murray, W. W. Pepys.*

1777.

MITCHELL v. GOVERNOR AND COMPANY FOR RAISING WATER, &C.

JOHN LIVINGSTONE MITCHELL, Esq. of Parkhall, ... *Appellant;*

THE GOVERNOR AND COMPANY of Undertakers for raising Thames Water in York Buildings, &c., ... *Respondents.*

House of Lords, 21st March 1777.

CHARTER—SUPERIOR AND VASSAL—RIGHT TO COAL.—The appellant laid claim to the coal of his lands of Madiston, although in granting the feu the superior had reserved the coal. Held that neither by the clan Act, nor the charter from the Crown, subsequent to the date of the superior's attainder, was the coal granted to the appellant's ancestors, but that the right to the same was vested in the respondents, as disponees of the Crown.

The lands of Madiston being part of the barony of Haining, belonged anciently to the Earl of Callender, and were feued by the Earl to the appellant's ancestor (Marshall) in 1647, to be holden of the Earl and his successors.

In this charter, there was the following clause of reservation as to the coal mines: "Reservata liberate et privilegio, "nobis, hæredibus et successoribus nostris, effodiendi et lu- "crandi carbones, calcem, et lapides calcis, jactandi lie holes "et sinks, faciendi lie shanks, vias et passagia, in et ad ead: "infra aliquam partem terrarum supra desposit, pro solutione "dictis Edwardo, suis filiis, orumque prædictis, quid damni "et detrimenti per ead, super eorum terras arabiles sustine- "bunt per decisionem dorum honestorum virorum, quorum "unum per nos et alterum per illos eligendum."

In the subsequent charter and precepts from the family of Callender to the heirs and successors of the said Edward Marshall, the same reservation was repeated.

By the clan Act, 1 George I., it was declared, that those vassals holding lands of superiors, who had been guilty of high treason, if they "continue peaceable, and in dutiful "allegiance to his majesty," they were thereby authorised to hold the same of his majesty in fee and heritage for ever.

The Earl of Callender having been attainted of high treason in 1715, the appellant's father took the benefit of the statute, and obtained a charter from the Crown, and this charter contained a clause of novodamus.

As attendant on the forfeiture of the Earl, the barony of

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MITCHELL v. GOVERNOR AND COMPANY FOR RAISING WATER, &c.

Haining belonging to him, fell to the Crown. It was sold to the respondents, the York Buildings Company, "with the "town and lands of Madiston, with coals and coal heughs "of the same," &c.

A suspension and interdict was brought by the appellant against the respondents and their tenants of the coal, in which he made claim to the full right in the coal of these lands, under the circumstances above stated.

Jan. 31, 1776. The Lord Ordinary pronounced this interlocutor: "Having considered this representation and answers thereto, and "state of the process, Find that the York Buildings' Com-"pany has right to the coal in the lands in question, and "that Mr Livingstone Mitchell has no right thereto; finds "that the York Buildings Company's tacksmen have right "to continue their possession of the said coal; assoilzies the "defenders from the process of declarator; finds the letters "orderly proceeded with, and discharges the caution for "damages found by the Earl of Errol, and James King (the "tenants), and decerns."

July 10, 1776. On reclaiming petition, the Court adhered, and on a second
Nov. 29, 1776. reclaiming petition the Court again adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Dundas, Al. Wedderburn, J. Dunning.*

For the Respondents, *E. Thurlow, Alex. Wight.*

1777.

BLAIR v. DOUGLAS, &c.

[Fac. Coll., Vol. vii., p. 194; et Mor. 14,577.]

DAVID BLAIR, Esq. of Dunskey, . *Appellant;*

Messrs DOUGLAS, HERON, and Co., . *Respondents.*

House of Lords, 30th April 1777.

PARTNERSHIP—ARTICLES.—In the articles of copartnery of the Douglas, Heron, and Co.'s Banking Company, it was provided that the heirs and executors of a deceasing partner should be obliged

to receive and draw his share in the stock and profits thereof, as the same should be ascertained by the last balance struck immediately preceding his death. The last balance was struck in November 1771. The appellant's brother died in October 1772; but in June 1772, the Company had become insolvent. In an action raised by the appellant, held that the clause of the contract could not apply to the circumstances of this case, in respect the Company had become bankrupt several months before Mr Blair's death.

The late John Blair of Dunskey was an original partner of the Banking Company of Douglas, Heron and Co., holding two shares of £500 each, in their capital stock, of which £775 had been paid up, as appeared from the receipts and the books of the Company.

In the seventeenth article of the partnership agreement, the following provision was contained, "That in the event of "the death or insolvency of any of the partners, the heirs, "executors, or assignees of the deceased, or creditors of the "insolvent partner, shall be obliged to receive and draw their "share in the stock and profits thereof, as the same shall "stand at the last preceding settlement of the Company "affairs, with interest thereof at 4 per cent. from that settle-"ment, till payment is demanded, and the legal interest "thereafter, till complete payment." And, by another article, the Company's affairs were to be balanced once a year. John Blair, above mentioned, was the brother of the appellant, and died on 17th October 1772; and the appellant having been decerned his executor, he became entitled to the deceased brother's share in the said Banking Company, and the profits due upon it as the same stood settled and valued at the balancing of the Company's affairs last preceding his brother's death.

Upon the ground of the clause of co-partnery above quoted, the appellant transmitted to Mr Christian, the Company's cashier, a note signed by himself, declaring his intention of not continuing a partner in his brother's place, but, on the contrary, demanding payment of his brother's two shares, as valued at the settlement immediately preceding his brother's death; but the Company alleged that they held the appellant to be a partner, as succeeding in the room and place of his brother. The Banking Company, it appeared, had become insolvent in the month of June 1772, before the appellant's brother's death.

The appellant brought an action against the Company, for

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an account of the two shares in question, according to the settlement immediately preceding John Blair's death.

Mar. 17, 1775. The Lord Ordinary pronounced this interlocutor:—"In "respect that the Banking Company of Douglas, Heron, "and Company, stopped payment on the 25th of June 1772, "several months prior to the death of the pursuer's brother, "in whose right he claims: Finds that the seventeenth "article of the contract of the co-partnery does not apply to "this case, therefore, assoilzies the defenders from this action "and decerns, superseding extract till the second sederunt "day of June next."

July 21, 1775. On a reclaiming petition, the Court were first of opinion that the respondents were "accountable for the value of his "brother's shares, as ascertained by the balancing of the "Company's books in November 1771; and remitted to the "Ordinary to proceed accordingly." But, on a reclaiming petition for the respondents, the Court pronounced this interlocutor:—"The Lords having advised the said petition, with "the answers, and heard parties' procurators on the cause, "in presence, with what is above set forth, and that it is "asserted by the procurators for the defenders, and not "denied by the procurator for the pursuer, that between the "balancing of the Company's books in November 1771, and "Mr Blair's death in November 1772, the said Company "became totally insolvent, in manner above set forth; there- "fore find that the petitioners are not accountable to the "respondent for the value of his brother's share, as ascer- "tained by the balancing of their books in November 1771; "and remit to the Lord Ordinary to proceed accordingly."

Feb. 13, 1776.

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellants, *Ja. Wallace, Ar. MacDonald.*

For the Respondents, *E. Thurlow, Al. Wedderburn, Alex. Murray, Alex. Wight.*

LORD FALCONER of Halkerton, . *Appellant;*

DAVID LAWSON, . . . *Respondent.*

House of Lords, 23d February 1778.

LEASE—AMBIGUOUS CLAUSE.—A clause in a lease of fifty-seven years, bound the tenant "to renounce at Lammas, before the "expiry of the first nineteen years, or prorogue the same for "three years, in the option of the said Lord Halkerton, and "the said David Lawson." Held, in an action of removing brought against the tenant, that this did not import an option that might be exercised by the landlord alone. Reversed in the House of Lords, and held it an option which either landlord or tenant might use singly and alone.

This is a case similar in its nature to that reported *ante*, vol. ii., p. 373, with the same appellant.

The late Lord Falconer, in the year 1756, let on lease the farm of Whitesaugh, for the space of fifty-seven years, to the respondent, Lawson, upon the conditions after-mentioned. The tenant was taken bound to leave the houses in as good repair as he found them, "and to renounce at Lammas before "expiry of the first nineteen years of this present tack, or "prorogue the same for three years, in the option of the said "Lord Halkerton and the said David Lawson."

The appellant, after Lord Falconer's death, succeeded; and conceiving that he had an option to recall the lease, he brought the present action of removing for that purpose.

In defence, the respondent stated that the farm was let to the respondent for the term of fifty-seven years absolutely; and although the lease mentions an option of renouncing at the end of the first nineteen years, yet that option is evidently given to the tenant and not to the landlord; and it was not in the power of the latter to remove him, unless he consented and gave up possession.

The Lord Ordinary pronounced this interlocutor:—"Finds Dec. 7, 1773.
"that by the clause in the tack founded on, there was an
"option stipulated to both master and tenant severally, there-
"fore, repels the defences, and decerns against the defender,
"David Lawson, conform to the conclusions of the libel."
But, on reclaiming petition to the Court, the following interlocutor was pronounced:—"The Lords having advised this July 27, 1774.
"petition, with the answers thereto, they assoilzie the de-
"fender and decern."

1778.

LORD FALCONER v. LAWSON. Feb. 21, 1775.

Vide Journals of the House of Lords.

Against this interlocutor Lord Halkerton presented a reclaiming petition, but the Court adhered.

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby reversed.

For the Appellant, *Al. Wedderburn, Al. Forrester, Gilb. Elliot.*

For the Respondent, *E. Thurlow, Henry Dundas.*

1779.

GRAY v. DOUGLAS, &c.

ALEXANDER GRAY, W.S., . . *Appellant;*

Messrs DOUGLAS, HERON, and Co., late Bankers in Ayr, and GEORGE HOME, Esq., Factor for the Partners of the said Company, . . . } *Respondents.*

House of Lords, 10th May 1779.

PARTNERSHIP—LIABILITY TO CONTRIBUTE FOR PAYMENT OF COMPANY DEBTS.—Held the appellant liable to contribute his proportional share of the debt owing by the Company, he being a partner of the Company.

The appellant was an original partner of Douglas, Heron, and Co. He was of the committee named by the subscribers for regulating their plan of operations, and was present, either personally, or by proxy, at seven of the nine general meetings of the partners, which were held during the subsistence of the Company, as a banking society. He was, therefore, it was stated, in the full knowledge of the Company's transactions. The Company having become insolvent in June 1772, the question for determination was, Whether the appellant, in these circumstances, could decline paying his share, along with the other partners, of the money which it was necessary for each partner to contribute, in order to pay the debts of the Company?

The appellant had only paid up £200 of his subscribed capital of £500; and the present action was raised against him for the £300, and for an additional call of £200 to pay off the debts.

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The Lord Ordinary decerned against him for these sums. On representation, the Lord Ordinary pronounced an interlocutor refusing. On reclaiming petition, the Court pronounced this interlocutor:—"Adhere to the interlocutors of July 31, 1777. "the Lord Ordinary reclaimed against, and refuse the desire Nov. 26, 1778. "of the petition: Find expenses due, and allow the pursuers "to give in an account thereof." And of this other date, Jan. 24, 1779. the Court pronounced this interlocutor:—"The Lords modify "the within account to £8, 8s. 11d. sterling, and decern."

Against these interlocutors the present appeal was brought.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Ja. Wallace, A. Macdonald.*

For the Respondents, *Al. Wedderburn, Henry Dundas, Ilay Campbell.*

1744.

THE EARL OF MORAY v. ROSS, &c.

The Right Honourable EARL of MORAY, . *Appellant;*

CHARLES Ross of Balnagowan, Esq., and Others, ... *Respondents.*

House of Lords, 6th April 1744.*

ENTAIL.—Special circumstances in which it was held that it was competent to the maker of an entail and the institute to put an end to the entail, and to convey the estate, although there were prohibitory and irritant clauses against selling and conveying the estate, and the entail was recorded.

David Ross of Balnagowan having fallen into debt, in consequence of which, and of outlawry, the liferent escheat of the Balnagowan estate was granted to James, Lord Ross, who afterwards acquired right to other adjudications, whereby the right to Balnagowan became vested in him.

Robert, Lord Ross, having made up proper titles to the estate of Balnagowan, conveyed the estate to David Ross, the eldest son of the said David Ross, and *to the heirs male of his body;* remainder to the said Lord Ross, *his heirs and* 1647.

* Omitted at its proper date.

THE EARL OF MORAY v. ROSS, &c.

assignees. Upon this conveyance David Ross obtained a charter, which contained a *novodamus* "to David Ross, and the "heirs male of his body, remainder to Lord Ross, as "aforesaid."

1666. In 1666, David Ross the third, intermarried with Lady Anne Stewart, sister to the Earl of Moray; and it was alleged, that David Ross then brought himself into great difficulties by debt. Several wadsets to the extent of nearly one-half of the estate, and five several apprisings were led against the whole estate.

At this time David Ross was in London; and it was stated, that advantage was taken of his distressed situation, by the Earl of Moray, his brother-in-law, then Secretary of State, to get from him a conveyance of his whole estate.

The Earl stated, that the incumbrances then on the estate amounted to L.6083, 6s. 8d.; and, in consideration of his advancing the sum of L.833, 6s. 8d., David Ross had executed the deed of entail, now brought in question, in favour of

1685. his second son, Francis Stewart. This entail was in these terms, "to and in favour of himself, the said David Ross, for "life, and to the said Mr Francis Stewart, in fee, and the heirs "male of his body," with several remainders over, with a proviso that the same should "be redeemable from the said "Francis Stewart, and the heirs male of his body, and other "heirs of tailzie herein specified, by the heirs male of the "said David Ross, upon repayment of the before-mentioned "sums."

It reserved to Lady Anne Stewart such parts and portions of the estate as were secured to her by her marriage-contract; and it contained the following prohibitions, "That it shall "not be lawful to the said Francis Stewart, nor to his heirs "of entail succeeding to the said estate, to sell, or convey "the said estate, or any part thereof, nor to contract debts, "by which the said estate might be evicted." There were also irritant and resolutive clauses, to protect these prohibitions, and a clause of absolute warrandice.

This deed of entail was further granted, upon this condition, "That the said Francis Stewart, after his majority, "shall be obliged to free the said David Ross from any "demands to be made upon him for the money contained in "the mortgages."

This deed, it was stated, as against the heirs of the before-mentioned Robert, Lord Ross, in case of failure of issue male, of David Ross, was void in point of law, so far as it was

not for a valuable consideration, and therefore they would have been entitled to the estate upon payment of the 15000 merks, or £833.

As against David Ross himself, this deed, the respondents contended, could only be viewed as a security for sums advanced. It, therefore, could neither be looked on as a purchase, or as a family settlement, or entail; because, though colourably and fraudulently thrown into that form, yet it was in substance not an entail. There was no family consideration; the two first takers were absolute strangers to his name and blood; it was nothing but a mere trust.

This deed was allowed to lie dormant until 1691, when it was recorded, and an infeftment taken upon it, which was done during the infancy of Francis Stewart.

Francis Stewart, at his coming of age, did not perform the condition of paying off the mortgages on the estate, amounting to £6083, 6s. 8d.

In 1686, the Earl, doubtful of his son's title by the above settlement, and looking to the clause of return in favour of Lord Ross' family, procured a bond from David Ross for 36000 merks, which, by the back bond relative thereto, was declared to be only granted for further security, and to strengthen the deed of settlement 1685.

In 1706, David Ross applied to Lord Ross' family, and by an agreement between them and Francis Stewart, it was agreed, that Lord Ross should pay Francis Stewart 63,000 merks, and that Francis Stewart should join with David Ross in making a new conveyance or settlement of the estate. This new settlement was executed accordingly; it being the joint act of David Ross and Francis Stewart, and this settlement bore "to and in favour of David Ross during his life; "remainder to the Lord Ross and the heirs male of his body, "with several remainders to others of the name and kindred "of David Ross, and with right of redemption to the *heirs* "*all of* David Ross' body, reserving power to both jointly to "make a new settlement." 1706.

In 1711 they accordingly made a new settlement of the estate in favour of Lieutenant-General Charles Ross, upon payment made by him of £5500 to Lord Ross, being the sum advanced by Lord Ross to Mr Stewart, and to Balnagowan's creditors, with the interest from the time of the respective payments. Upon this the General was infeft and attained possession after the death of David Ross and his widow.

In 1727 General Ross made a settlement of the estate upon

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Charles Ross, the respondent, second son to George, now Lord Ross, who was, upon the General's death, in 1733, infeft in the estate.

Fourteen years after the appellant came of age, and thirty-two after his right accrued, and thirty-seven after the date of the deed 1706, he purchased brieves for serving himself heir to his father on the estate of Balnagowan, and afterwards brought a reduction of that settlement, as being contrary to the clause *de non alienando*, contained in the entail, 1685. And the respondent brought a declarator.

In these conjoined actions it was argued for the appellant, that the entail, 1685, contained strict prohibitions against selling or disponing the estate, which were fenced with proper irritant and resolutive clauses, and the entail was duly recorded, and, such being the case, it was not in the power of the maker of the entail, and the institute, by their joint act, to put an end to the entail, and therefore that David Ross and Francis Stewart could not convey away the estate by the deed 1706.

It was answered that the deed of entail 1685, was not absolute but redeemable. It was in its nature merely a security for the sum, £833, advanced by the Earl of Moray: That it was, besides, conditional, and the condition was the payment of David Ross' debts, which burdened the estate, amounting to £6082, 6s. 8d., which condition was never complied with: That, therefore, there was strong evidence for believing, that the deed was never accepted by Francis Stewart, the appellant's father. The Lords pronounced this interlocutor:—"Upon

Nov. 17, 1743. "consideration of the disposition 1685, in favour of David "Ross of Balnagowan, in liferent, and of Mr Francis Stewart, "father to the Earl of Moray, pursuer, in fee, with the infeft-"ment thereon, with the whole circumstances of the case: "Finds, that it was in the power of Mr Francis Stewart and "David Ross of Balnagowan, jointly to make the settlement "in the year 1706, in favour of the said David Ross, in life-"rent, and William Lord Ross in fee, and of the heirs of "tailzie therein mentioned; and that the said settlement "made in the year 1706, is not liable to challenge at the in-"stance of Mr Francis Stewart, or his heirs male, and there-"fore find that the Earl of Moray cannot be served heir in "special to his father in the estate of Balnagowan, and "assoilze the defender from the reduction of the tailzie made "in the year 1706, and remit to the Lord Ordinary in the "mutual processes, to proceed accordingly."

On reclaiming petition, the Court adhered.

The Lord Ordinary thereafter "found and declared that "Charles Ross of Balnagowan, had the only good and un- "doubted right to the lands and estate of Balnagowan, and "that the Earl of Moray and other defenders called, in Bal- "nagowan's declarator, had no right thereto, and ordained "the defenders to desist from troubling and molesting the "said Charles Ross, in the possession of the said estate, and "decern accordingly."*

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Al. Lockhart, C. Erskine.*

For the Respondents, *R. Craigie, W. Murray.*

[Fac. Coll., Vol. viii., p. 46, et Mor. 8822.]

WILLIAM, DUKE OF MONTROSE; JAMES, MARQUIS OF GRAHAM; JOHN GRAHAM of Duchray; GEORGE GRAHAM of Kinross, and Others, . . . *Appellants;*

Sir JAMES COLQUHOUN, Bart. of Luss, *Respondent.*

House of Lords, 19th February 1782.

SUPERIOR AND VASSAL—MULTIPLICATION OF SUPERIORS.—Held that the superior was not entitled to grant certain liferent conveyances of the superiority of the vassal's lands, so as to multiply superiors over him, and the dispositions reduced.

The family of Colquhoun had at different times, by grants directly to themselves, or by purchase from other grantees, accumulated a very considerable estate, holding under the dukedom of Lennox, each of these parcels of land originally

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* For opinions of the Judges, *vide* Elchies, vol. ii., p. 451.

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granted by separate titles, and paying separate and distinct quit rents, or reddendos, to the family of Lennox, the over Lords.

In 1755, the present respondent obtained from the commissioners, appointed by the Duke of Montrose to manage the affairs in Scotland, a charter of all the lands he held under the dukedom of Lennox, consisting of no less than ten several parcels, for each of which there is a separate quit-rent or reddendo. Eight of these are held for payment of one penny Scots each. The ninth for payment of a pound of pepper if *petatur tantum*. The tenth was formerly held ward; but since the Act was made for abolishing ward holdings, it had been changed to a feu holding for payment of a quit-rent or feu-duty of 8 pounds 7 shillings and one penny Scots.

The Duke of Montrose, wishing to give freehold qualifications in the county of Dumbarton, to several of his friends, did, for that purpose, resign the greatest part of the dukedom of Lennox, and particularly the estates held under the dukedom by the respondent, Sir James Colquhoun, in favour of his only son, the Marquis of Graham, who passed a charter thereof under the Great Seal.

After which, the Marquis executed liferent dispositions in favour of the fourteen gentlemen, appellants in this cause, of parcels of the superiority of the lands held by the respondent, under the dukedom of Lennox, and assigned them severally the precept of sasine in his crown charter, by virtue of which they were regularly infeft.

The respondent brought an action to reduce and set aside these several liferent dispositions and infeftments, on the ground that the whole lands therein contained, were holden by him of and under the said Duke, and, therefore, could not be separated in the manner attempted by these dispositions, without multiplying superiors upon him.

July 11, 1780. Lord Kaimes, Ordinary, pronounced this interlocutor:— "Sustain the reasons of reduction, and reduces, decerns, and "declares in terms of the libel." On a representation he

Aug. 8, 1780. adhered.

The appellants reclaimed to the Court; and in his answers to that reclaiming petition, the respondent maintained, that a multiplication of superiors subjects the vassal to grievous inconveniences and hardships, because, 1st, In the present case, he must have recourse to fourteen superiors, and must have fourteen different charters, before he can be fully entered in, or invested with, his estate. 2d, He must account to, and settle

with, fourteen different superiors, the fine and sum to be paid the superior for relief, on granting such entry, besides the non-entry duties for the years that the vassal was unentered. 3d, He would have to account to fourteen different superiors annually, for the quit-rents, whether they were feu or blench duties, by which he held the lands.

The Court pronounced this interlocutor:—"The Lords "having advised this petition with the answers, they repel "the reasons of reduction in so far as relates to the charter "in favour of the Marquis of Graham, and with that variation, "adhere to the interlocutor of the Lord Ordinary reclaimed "against, and refuse the desire of the petition: Find expenses "due; and appoint an account thereof to be given into "Court." On second reclaiming petition the Court adhered. Feb. 17, 1781. Feb. 1, 1781.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Henry Dundas, Tho. Erskine.*

For the Respondent, *David Rae, Ilay Campbell.*

JAMES DALRYMPLE, Esq., and Dr WILLIAM DALRYMPLE, one of the Ministers of Ayr, JOHN BALLANTINE, Merchant in Ayr, WILLIAM PATERSON, Writer in Kilmarnock, and Others, . . . } *Appellants;*

ROBERT HUNTER, Esq. of Thurston, and ELIZABETH, COUNTESS OF GLENCAIRN, JAMES, EARL OF GLENCAIRN, and Others, ... } *Respondents.*

House of Lords, 17th June 1784.

ENTAIL—FETTERS.—An entail prohibited the sale of the estate, and laid the fetters on the "substitutes *before mentioned* and *described by name.*" Held that this was sufficient to include within the fetters the descendants of the body of those substitutes.

The lands of Orangefield and Prestwickshaws, having been sold to the respondent, Mr Hunter, a question arose whether

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the parties had a power to sell. The purchaser brought a suspension of a charge for the price, alleging that the sellers could not give a good title, because the estate was held under the fetters of a strict entail, which prohibited selling. On the other hand, the appellant, Mr Dalrymple, brought an action of declarator, calling the respondent, Mr Hunter, and the heirs of entail, to have it found and declared, that Miss Macrae Macquire had full power to sell the lands in question; at least that he had such power.

These two actions were conjoined, and memorials ordered on the points.

The entail was conceived in these terms:—"To and in "favour of Miss Macrae Macquire, and the heirs male of her "body, whom failing, her heirs female, whom failing, to Miss "Margaret Macquire, and the heirs male and female suc- "cessively of her body; whom failing, to Miss Jacobina "Macquire, or Countess of Glencairn, and the heirs of her "body, in like order," &c. It also contained this prohibition, —"That it shall not be allowable to the said Miss Macrae "Macquire, nor to any of the substitutes *therein mentioned* "and *described by name*, to sell or dispose upon any part of "the lands and barony foresaid, nor to contract debts, or to "do any other deed whereby the same may be evicted from "any of the succeeding substitutes." These prohibitions were enforced by irritant and resolutive clauses, and the entail was duly recorded.

The irritant clause declared, "That if the said Miss Macrae "Macquire, or any of the *substitutes before mentioned and* "*described by name*, shall do on the contrary hereof, not only "the deeds of contravention shall be absolutely void and "null," &c.

Miss Macrae Macquire was stated to be the institute in this entail. She was afterwards married to Mr Dalrymple. The appellant, James Dalrymple, was her son, and of course a substitute under the entail.

In 1781, she, with consent of her said son, had executed a new settlement, whereby she conveyed the estate in favour of him, and the "heirs male of his body;" and it was afterwards sold as above stated.

The appellants' plea was, That Mr Macrae, the maker of the entail, meant only to *limit* the *substitutes called by name* but not the substitutes *not named*, and, therefore, his intention was to allow the estate to descend in fee simple to the children of the bodies of those substitutes. It was answered, that such a

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proposition could not be entertained. That it could not be meant to fetter all the substitutes *named*, and at sametime to leave all their unborn issue unfettered, as such a construction would be untenable and absurd. An entail imposing prohibitions and irritances upon the substitutes called by name, and yet leaving the entail to descend in fee simple to the heirs of those substitutes, was anomalous, and totally unprecedented in the law of Scotland.

Upon the report of Lord Stonefield, and having advised the memorials ordered, the Court pronounced this interlocutor: March 4, 1783. "Sustain the reasons of suspension pleaded for Robert "Hunter of Thurston, and the defences pleaded for the "Countess of Glencairn and others, suspend the letters, as- "soilzie them from the declarator, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and ajudged, that the interlocutor be, and the same is hereby affirmed.

For the Appellants, *Henry Dundas, Ilay Campbell.*

For the Respondents, *Robt. Blair, Alex. Tytler.*

1803.

MARSHALL, &c. v. STEIN.

MARSHALL, and the STIRLING BANKING COMPANY, and Others, . . *Appellants;*

JAMES STEIN, . . . *Respondent.*

House of Lords, 27th May 1803.

This case is reported in Vol. iv., p. 480, which had reference to certain objections stated by the creditors of a bankrupt, to his application for his discharge, with the usual concurrence. Since that report was published, the short-hand writer's notes of the full speech have been recovered, as below.

LORD CHANCELLOR ELDON said:—

"MY LORDS,*

"This case appears to me to be of great importance, and to call for your Lordships' particular attention before it is decided.

"My Lords, it is an appeal from the Court of Session in Scotland, in a case which I confess I read with some degree of sur-

* From Mr Blanchard's short-hand notes.

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prise, that it was competent (though I find it so), for the appellants to take the opinion of this House upon the question which has been submitted for its consideration; it is, however, I believe the first of the kind.

"My Lords, the respondent in this case, is a gentleman of the name of Stein, who has been concerned in very large commercial transactions, and who became bankrupt according to the law of Scotland, in February 1788. The petition alleges he had become bankrupt as long back as 1788, and that in the course of the time till the petition was presented, five dividends had been paid, and that he had obtained the concurrence of four-fifths of his creditors, both in number and value, to his discharge. By the Act of Parliament (the substance of which I shall have to state presently), the concurrence of the creditors in the wish of the bankrupt to be discharged, is of no avail, until there has been a judicial proceeding in the Court of Session had upon it, which proceeding cannot take place till the expiration of three months from the day on which the petition is presented; the Court are then to judge of the principal circumstances mentioned in the Act of Parliament, as attaching to the conduct of the bankrupt; and if they are of opinion that he has conducted himself in the manner in which the law says he should, to entitle him to the benefit of that Act, they are to decide that he has so conducted himself, and he is thereafter discharged of his debts as to his personal estate and effects; if, on the other hand, the Court is of opinion that his conduct has been such that he ought not to have his discharge, although four-fifths of his creditors have signed his certificate, stating they thought he ought to be entitled to it, they dismiss the petition, and he remains in the state in which they found him at the time the petition was presented. Your Lordships see from this statement of the case, *first*, That a bankrupt in Scotland cannot be discharged as to his estate and effects, without the consent of four-fifths of his creditors; and, in the *next* place, that *that* consent will not discharge him, unless the view of the Court of Session has been judicially thrown over the transaction; and unless that Court shall be of opinion that the creditors have acted properly towards the bankrupt, in endeavouring to give him his discharge. Upon this occasion, the bankrupt had the unanimous concurrence of the Court of Session, with the opinion of the creditors, who concurred in the discharge.

"My Lords, I conceive according to a general principle, that the proceedings of the Court of Session are open to the review of this House, unless the Act of Parliament, which has given the Court of Session jurisdiction, has precluded the jurisdiction of this House. I am apprehensive it cannot be denied that it is competent to appeal, but I choose to mark the case, because I cannot but entertain a doubt which may (if it shall appear to be well-

founded), require some consideration, whether this jurisdiction as to bankruptcy, should not be made final in the Court of Session; because you will see, if a creditor for 16s. for instance, and I mark the sum (because one of the creditors (Marshall) has been represented to be a creditor for 16s. only); if after a bankrupt has undergone all the judicial inquiry of the Court of Session, which has concluded in an unanimous opinion with the four-fifths of his creditors who had previously judged he had done right,—I say, if a creditor for £5 or £20, can bring under the review of this House, the concurrence of the creditors, so followed by the decision of the Court of Session; in such a case (where the bankrupt is friendless and pennyless), your Lordships must see at once that he had better submit; indeed he must submit to the attempt to deprive him of his discharge, whether there be any sound reason for it or not, instead of coming to the bar to support his claim to that discharge, which four-fifths of his creditors, and the unanimous opinion of the Court of Session, have declared he is well entitled to.

"My Lords, the petition which was originally presented to the Court of Session, was a petition presented by the bankrupt, which stated the circumstances of a sequestration having taken place of his estates, real and personal, as long ago as the 28th of February 1788. It mentioned, after stating the title of the Statute, that after the examination of the bankrupt had taken place, and after he had given up his whole estate, the funds were converted into money, and that five dividends were made among the creditors, at different periods, the last on the 28th December 1797; and it is the law in Scotland that a bankrupt cannot petition for his discharge till there have been two dividends.

"My Lords, it appears that there were 114 creditors of the bankrupt, 95 of whom concur in opinion that he ought to receive his discharge. The debts, in respect of which the 114 creditors prove, were £163,073; the debts upon the estate were £199,497, so that it is quite clear there was a sufficient number of creditors, both in number and value, in his favour. It will appear to your Lordships, from this statement, both as to the amount and the number of creditors, that this person must have been a very considerable trader. And your Lordships will advert, that where it turns out that a debtor does owe so large a sum, it is no small proof, that before and since his bankruptcy, he has conducted himself honestly, that he has so large a proportion of the creditors in his favour.

"My Lords, this petition having been presented to the Court of Session, the appellants, under an Act of Parliament, become what they call objecting creditors. These appellants were Mr James Marshall, who stands upon the proceedings as a creditor for £24; and, it has been represented at your Lordships' bar, that this debt

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was made up of demands consolidated in the person of Marshall, to the number of thirty, which is 16s. each. There is Mr Telford, who represents the Stirling Bank, which has considerable demands; there are Messrs Campbell, Thompson, and Company, which includes a gentleman of the name of William Paterson, who has likewise a distinct debt in his own person. The only opposition to the petition, is the opposition of the four classes of creditors I have mentioned.

"My Lords, when this petition was presented to the Court, a question arose upon the Act of the 23d of his present Majesty, by which it is enacted, that it shall be competent to four-fifths in number and value of the creditors reckoned as before (that is, creditors whose debts are under twenty pounds, being reckoned in the value but not in the number), at any time after the period of the second dividend, to concur with the bankrupt in a petition to the Court of Session, praying that he may be held as finally discharged of all his debts contracted before the application for sequestration, so far as the same may affect his person after the date of the discharge. Your Lordships will allow me to observe, this is most admirable, compared with the law in this country. Your Lordships know that the creditors sign the certificate in England, and the certificate is advertised in the "London Gazette," and unless some creditor happens to look sharp, it comes to the Great Seal, as having been duly advertised and signed; but in Scotland it is not so; the party is not taken by surprise; he signs the concurrence, he concurs in the petition, and the Court of Session cannot proceed to discuss the merits of that application, till the petition has been laid before the Court for three months, in order to give all parties an opportunity to come in; so that it is a judicial act, instead of what is often in this country, the act of a few creditors, assembled over brandy and water: 'And this 'petition being intimated upon the wall, and in the two Edin-'burgh newspapers before mentioned (that is the "Caledonian 'Mercury" and "Edinburgh Evening Courant)," the Court shall, 'at the distance of not less than three months thereafter, resume 'the consideration thereof, and if no objection is made, they shall 'pronounce an act or order in terms of the prayer of the petition; 'and if appearance is made by any of the creditors, objecting that 'the discharge ought not to be granted on account of the bank-'rupt's not having made a fair discovery and surrender of his 'estate, or that he has refused to grant a disposition to the trustee, 'as ordered by the Court, or has wilfully not attended the diets of 'examination, or has been guilty of any collusion, or that his 'bankruptcy did not arise from innocent misfortunes, or losses in 'business, but from culpable or undue conduct, the Court shall 'judge of these objections and allow a proof of them, if it is thought 'necessary;' thus leaving a good deal to the discretion of the

Court, 'and shall either grant or refuse the discharge, as the 'nature and justice of the case may require.' My Lords, it does not stop there, for all these precautions being taken before this judicial discharge can be had, the bankrupt is to take an oath (which is inserted in the Statute for the purpose), or upon commission, when judgment is pronounced in his favour, and before the Act can be extracted, 'that he has faithfully complied with all 'the requisites of the Statute, and has used no undue influence, 'nor had recourse to any compromise with his creditors, or any of 'them, to obtain their concurrence.'

"My Lords, before I state the grounds upon which the creditors objected, your Lordships will permit me to state, from these notes of the speeches of the judges, what passed in the Court of Session, which, though not regularly before your Lordships, we are in the habit of referring to, because they give useful information, and I humbly concur with them, that some of these appellants are exceedingly reprehensible.

"My Lords, with regard to the Stirling Banking Company, it is alleged in these papers, and I need not tell your Lordships, who are in the habit of reading papers and cases that come from the northern part of this island, that they are not sparing of their allegations, and they seldom abstain from denying circumstances if they can do it, and generally say, they are ready to support their allegations by proof, if they are denied. With regard to the Stirling Banking Company, it is stated, that at a meeting, they entered into a formal resolution, not to concur in the discharge of the bankrupt without a consideration, and they actually specified the sum they would accept of; and if denied, this assertion was offered to be proved by sufficient evidence. There was no occasion to prove it, if it was not denied. I have read the papers from the beginning to the end, and cannot see this fact denied; and with regard to the next class, Campbell, Thomson, and Company, which includes Mr Paterson, as far as he is concerned, with regard to that part of his debt, they write a letter in these terms:—'Dear Sir,—Some 'time ago a proposal was made to Campbell, Thomson, and Com-'pany, and the Stirling Bank' (this is an allegation contained in a 'subsequent paper), 'for their concurrence to Mr Stein's discharge, 'and a composition of 2s. 6d. per pound was offered' (this is a fact which they state, but which is denied on the other hand), 'the 'Company, I believe, wished 5s., but when it was mentioned to 'me' (and that is Mr John Campbell, whom I understand to be the man of business), 'I recommended them to accept the offer; 'no person, however, appeared, although I have understood, not 'long ago, that some steps of the kind were on foot; I know the 'Company will not give their concurrence gratis, but if the offer 'of 2s. 6d. per pound is renewed, I shall do my endeavour, to get 'the partners to agree.'

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'Now, my Lords, I have had frequent occasion, since I have held the important place I do, to look at these transactions. It has become the practice, in our part of this island (at least it is not a very uncommon thing), for a man to say to a bankrupt, if he has behaved well, and is the bankrupt of misfortune, through which he is entitled to the protection of the law; I say it has become not very unusual when he has got near four-fifths in number and value, for the creditors to say, 'If you mean to have me, 'you must give me something for my concurrence.' The bankrupt 'stands out and says, 'That will not do, you know the situation 'in which I stand; you ought to have some compassion, but I want 'to get four-fifths in number and value, and rather than miss it, 'I will do it.' Perhaps some other creditor wants to have some money for his consent, and though the bankrupt knows his consent is worth nothing, yet he knows his dissent may create a great deal of confusion; the creditor presents a petition, stating his own allegations, and filled with all that ingenuity can put upon paper for him; and, I dare say, very often, my learned and noble friend, who sits near me, knows that, after reading them with a view to do justice to the creditors, and to take care that the bankrupt should have the benefit of the laws of the country, the consequence often has been, though the bankrupt has had four-fifths of his creditors in number and value unimpeachable, that he has been obliged to buy off other creditors, rather than experience the misery which attends the hearing a petition. Since I have had the honour of succeeding to the office I now unworthily fill, I have made it a rule, that the petition, if once tabled, shall be heard, in order that the Court may judge of it.

"My Lords, in the present case, Mr Inglis answered this letter of Mr Campbell; and in that answer he suggests, that the family of Mr Stein knew nothing of this offer of 2s 6d. in the pound; and there the correspondence ended. It is quite clear, taking it to be true, that they offered 2s. 6d. in the pound, the matter does not go on; for the creditors say, we will not consent. On the other hand, it appears to be a dispute, whether it shall be 2s. 6d. or 5s. With regard to Mr Paterson, there is no allegation, and, of course, no proof in the proceedings, that he, with regard to his distinct debt, was dealing for a corrupt consideration. But Mr Paterson is a member of that Company who is so dealing; and, therefore, the motive which might be taken to influence the partnership, might have some influence upon his conduct, with regard to the debt in his own person.

"My Lords, with regard to Mr Marshall, he represents the sum of £24; that £24 being made up of thirty debts, his own debt amounting originally to 16s. When this came before the Court, your Lordships observe, their duty was to be satisfied that there were four-fifths of the creditors in number and value; those under

£20 being reckoned in value, but not in number, and that they concurred. They were also to hear the objecting creditors; and if they could be satisfied by the objecting creditors, that the bankrupt had not made a fair discovery and surrender of the estate; that he had refused to grant a disposition to the trustee; had wilfully not attended at the periods of the statutory examinations; had been guilty of any collusion, or that the bankruptcy did not arise from any misfortunes or losses in business, but from culpable or undue conduct, they were to judge of those objections, and allow a proof of them, if necessary, and either grant or refuse the discharge, as the nature and the justice of the case should require.

"My Lords, the first objection made by the objecting creditor was this, that the Court could not grant this petitioner's discharge in consequence of the bankrupt having retired to a foreign country. Your Lordships observe, in the terms of the Act of Parliament, the bankrupt is to take an oath before the Court, or upon commission, which last words are inserted in the Act of Parliament, expressly with reference to the case of absence (that, though the bankrupt might be absent, he might have duly observed all that was required by the Act); and it was accordingly decided by the Court of Session, that it was not necessary for the bankrupt to be in this country. The bankruptcy took place in 1788; all the requisites have been complied with; the parties were in possession of all the books and papers; therefore, how can it be necessary to the question, whether a man shall be discharged or not, that he shall be personally present at the time that the question is discussed in the Court?

"My Lords, the next objection was this, that several of the persons stated had not concurred in the discharge; and I observed the learned counsel fell into expressions which belong rather to the proceedings in bankruptcy here than in Scotland; and the objection is, that it had not been proved that the persons who signed the concurrence, were vested with sufficient powers from creditors. With reference to that, your Lordships will see what the mode of proceeding is in Scotland. The Court of Session require the creditors to sign what is called a deed of concurrence, and the deed of concurrence, in this case, is signed by those persons who had acted as the attorneys of the creditors throughout the proceedings, in 1788. The application is the application to the Court of Session; and if application is made to that Court by the bankrupt, and by counsel for the creditors, stating to that Court they appear for the creditors, is not that ground enough for that Court to proceed upon? And you cannot state a case more vexatious than *that* of bringing an appeal from the Court of Session up to this House, in a case of bankruptcy, where, ninety-nine times out of a hundred, the bankrupt would be unable to

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defend himself in point of expense; and out of those ninety-five creditors in this case, the counsel at the Bar have not been able to state to your Lordships the name of any one creditor, who has not agreed to the discharge, in the manner I have stated.

"My Lords, the next objection is, as to the conduct of the bankrupt.

"My Lords, there seems to have been a great deal of dispute in the Court below, what was the situation in which the bankrupt stood, with reference to the demands which the creditors could make upon him in the Court of Session. The bankrupt had become such; he had undergone extraordinary difficulties; he had given up all his property, which had been applied to pay his debts (though it is but fair to say it made but a small part of his debts); after proceedings had been had from 1788 to 1802, and the number of creditors I before specified had agreed to concur in the application to the Court of Session; in other words, saying, we are four-fifths of the creditors in number and value, and agree, that before the bankruptcy, and since, the bankrupt did not demean himself dishonestly; and although the objecting creditors have not shown any instance of misconduct, yet they say, we call on you (the bankrupt) to give an account of all your transactions, and to make out to the Court of Session that you have acted as properly as your creditors say you have. But that is not the proper mode of proceeding. The bankrupt has had the testimony of the Court of Session that he had acted properly; and after a vast deal of representation, attended with a great deal of expense, with reference to what had been the conduct of that gentleman before he became bankrupt, speaking with those morals I have got into my head, and infected with that sort of feeling which I possess, I do confess, I do not think the conduct of a man, who has been going on speculating with his own money, and the money of others, till he gets himself involved in a bankruptcy, and with him fifty other persons,—I confess, I do not think all the transactions about accommodation bills (which I wish never had been heard of), for they are frauds unquestionably on the law; and how it has ever happened that they have been endured, expressing on the face of them that they are given for value received, when in fact, they are of no real value, does seem to be a whimsical thing, and has done a great deal of mischief in this country; for it often turns out that a man has no effects, after putting his hand to them. But, on the other hand, I do not know how it is to be remedied, without subverting the system of our bankrupt laws, and the bankrupt laws of Scotland, because he has been doing that which honourable men upon change are constantly doing; and because he has been speculating to raise himself into opulence, or endeavouring, by speculation, to relieve himself from difficulties, and avoid penury and ruin.

"My Lords, the next objection made in the Court below, was, that the bankrupt had been himself buying the concurrence of his creditors. With reference to that, the Court of Session were of opinion that he had not done so, and gave them leave to condescend upon particulars; and, when they did so, the Court of Session were of opinion, the condescendence they put in did not contain sufficient grounds of complaint, and your Lordships, upon reading the papers, will agree with that opinion. It appears to me, this is an appeal dictated upon corrupt motives, and brought forward by persons who have been dealing corruptly; and every case which is brought under such circumstances, is to be looked at with great jealousy and suspicion. I say it is wise and proper to do so. In addition to that, your Lordships will allow me to say, that although this jurisdiction does exist, and that it is competent for Mr Marshall, or any other person, who has a debt of 16s., to draw a bankrupt here, even when it is an appeal from the unanimous decision of the Court of Session, under such circumstances as appear in this case, it is grave matter for your Lordships' consideration, whether such right of appeal should continue. It is particularly so in the case of a bankrupt, under all the disadvantages I have alluded to; and, therefore, in a case where there are creditors, in number and value, enough to give a sanction for the certificate, and the bankrupt has complied with every requisite imposed upon him—in a case where the acts have come under the review of the Court of Session, and that Court has unanimously been of opinion that the bankrupt ought to have his certificate—in a case where there is suspicion that the objecting creditors have been dealing, not for the justice of the country, to withhold the certificate, but that they have been dealing for the proportion of dividend they ought to have; in such a case as that, it is not too much to say, that a bankrupt who is brought here by appeal from the Court of Session in Scotland, and who receives the confirmation of your Lordships, should come here without being put to any expense; and, under such circumstances, unless your Lordships should be of opinion that the case made out by the appellants at the bar, calls for the reversal of the decision of the Court below (for which, it appears to me, there is no ground), I conceive that decision should be affirmed with £150 costs."

SAMUEL STIRLING, and Others, . *Appellants;*

ROBERT FORRESTER, Esq., Treasurer to the Governor and Company of the Bank of Scotland, ... *Respondents.*

1821.

STIRLING, &c. v. FORRESTER.

House of Lords, 19th March 1821.

CAUTIONER—DISCHARGE OF.

This case is reported in Mr Shaw's Appeal Cases, vol. i., p. 37. It had reference to the question whether sureties who had guaranteed the payment of bills, were liberated from their cautionary obligation by the creditor taking other bills from the debtor, and giving up those they had guaranteed, and where it was held that one of the cautioners, whose consent had not been obtained to this, was discharged.

The LORD CHANCELLOR said,

"My Lords,*

"There is another case argued before your Lordships, and extremely well argued, I mean the case of Stirling and Others, v. Forrester. On looking through all the circumstances of that case, and giving the best attention I have been able to give, to what I take to be the doctrine of the law of England, which certainly also is the doctrine of the law of Scotland, as to the acts of the principal creditor towards a surety, and likewise with respect to the acts of sureties as among themselves, it does appear to me, as at present advised, that the judgment which has been given in the Court below, cannot stand in all its parts. It will, however, be necessary, or at least expedient, that the House, in framing its decree, should be extremely cautious and careful with respect to the doctrines it shall state, as doctrines to govern cases of this kind. It has seemed to me, therefore, to be necessary, in using that caution, to request that before this judgment be given, the agents on each side being furnished with a copy of the paper which I now have in my hand, should give an answer when they are able to do it (probably in the course of two days), to the following inquiries,—What has become of the several bills drawn by James and George Spence upon and accepted by David Paterson, by Tod and Company, and Robertson and Stein respectively, and Whether these bills respectively, have been proved against the estates of all the several parties, to those bills or any, and which of them and by whom they have been proved, and what dividends have been received on each and every of those bills from the several estates of James and George Spence, David Paterson, Tod and Company, and Robertson and Stein respectively, besides those which are expressed and mentioned in the account that is delivered, and by whom and in what state the proof on those bills

* From Mr Gurney's short-hand notes.

stand, and particularly who is or are now entitled to receive the dividends thereon, if any future dividends of those estates should be made? My Lords, having the result of these inquiries, if a satisfactory result, we shall be able, probably, to give a more satisfactory judgment; if not a satisfactory result, I will then take the liberty to propose to your Lordships such a judgment as, under the circumstances under which we may be placed, may best meet the case. The question is certainly an extremely important one, as affecting co-sureties in Scotland, and I should hope, therefore, your Lordships will not think it improper that I should ask for answers to these inquiries before we proceed to judgment. I had better, perhaps, adjourn it to Friday, or to this day week."

SIR JAMES MONTGOMERY, Bart., and Others, *Appellants;*

WALTER FRANCIS, DUKE OF BUCCLEUCH AND QUEENSBERRY, and Others, . *Respondents.*

AND

JOHN HYSLOP, ... *Appellant;*

WALTER FRANCIS, DUKE OF BUCCLEUCH AND QUEENSBERRY, and Others, . *Respondents.*

House of Lords, 29th June 1821.

ENTAIL—LEASE—PURGATION OF IRRITANCY.

These appeals had reference to the Queensberry leases which in the former appeals (*vide ante*, p. 520 *et* 540) were found to be beyond the powers of the heir of entail. On the case going back to the Court of Session, the executors contended that, supposing the leases to be a contravention of the entail, yet it was competent for them and the tenants to purge the irritancy, but the Court, 25th February and 6th July 1820, refused purgation of the irritancy; stating that as the Duke was now dead, no contravention or forfeiture could be declared against him. *Vide* Shaw's Appeal Cases, Vol. i., p. 59.

The LORD CHANCELLOR (ELDON) said,

"My Lords,*

"In these two causes, on account of the many interests involved

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* From Mr Gurney's short-hand notes.

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MONTGOMERY, &c. v. THE DUKE OF BUCCLEUCH, &c.; AND HYSLOP v. THE DUKE OF BUCCLEUCH, &c.

in them, and the magnitude of the questions in point of value, it was necessary to consider them very maturely, and it has till now been quite impossible to give that full consideration which was proper.

"The substance of the question under these two appeals is, that the Court of Session has denied the application of the doctrine of purgation to the leases in dispute.

"Where a reversal of a judgment is moved in this house, it has been usual to state the grounds upon which such reversal is proposed to be made; but where an affirmance is moved, it has not generally been the practice to state the reasons for such affirmance.

"After a most painful and anxious attention to the printed papers in these causes, to the arguments at the bar, which were most able and ingenious, and to all that could be urged in any way, and after having carefully looked at all the authorities referred to, having looked back to the summons, and recollecting what passed formerly in these cases in your Lordships' House, with every feeling for the parties interested, I cannot refrain from stating that I do not see cause to reverse the interlocutor pronounced by the Court of Session."

LORD REDESDALE.—"My Lords, I am under great difficulty to conceive how the questions which have been raised in these cases could be raised. I have looked carefully into all the papers, but I cannot see any sufficient grounds to alter the decision of the Court of Session."

(Judgment of affirmance would then have been given, but there were not Peers enough to make a House without Lord Montague, who was a party. The Lords, therefore, adjourned moving the judgment till Monday).

1822.

THE DUKE OF ROXBURGHE v. KER.

The DUKE OF ROXBURGHE, . . *Appellant;*

Lieut.-General KER, . . . *Respondent.*

House of Lords, 3d, 17th and 24th May 1822.

BASTARDY—SASINE—RES JUDICATA—PROOF OF ILLEGITIMACY—MARRIAGE OF ADULTERER WITH ADULTERESS.

In this case several important questions occurred, as, 1st, Whether an action which was, at the request of the pursuer, sought to be withdrawn after defences were lodged, and the Court, of consent, allowed him to withdraw it, and at sametime *assoilzied* the defender, was to be held a *res judicata* in the new action brought? 2d, Whether, where a predecessor

of the Roxburghe family who had committed adultery, and afterwards married the party with whom it was committed, that marriage was lawful, and the issue of it entitled to inherit? 3d, Whether a cadet of the family against whom bastardy was alleged, was to be deemed as such, after an interval of so many years, during which the family dealt with him in their deeds and settlements, and otherwise, as a lawful born son, upon the discovery *de recenti* of a sasine describing him as a *filius carnalis?* 4th, Whether these words, *filius carnalis*, were to be taken and received as proving *per se* his bastardy, and whether they were so interpreted in the law of Scotland, by long usage, although capable of a different interpretation in the language from which they were borrowed. 5th, Whether the pursuer had a title to pursue.—*Vide* Shaw's Appeal Cases, Vol. i., p. 157.

The LORD CHANCELLOR (ELDON) said,

"My Lords,*

"I feel a conviction that your Lordships would consider me rash, were I to propose that you should proceed to judgment in this very difficult and important case, which has occupied five days in the argument, upon any grounds that I could at present offer to your consideration.

"This cause contains many different points. *First*, There is a question upon the summons. Speaking as an English lawyer, I may say, that it is extremely vague, and does not contain sufficient allegations. The addition of a few words would have removed this objection. When I find, however, that the Attorney-General does not *admit* that his client has *no title to pursue;* and that on the other side, it is contemplated that he *has a good title*, I must hesitate in forming a contrary opinion. But I may say, that if it shall be found necessary to remit this cause, I should be inclined to include this point in any remit.

"There is another point which must be dealt with by us, namely, whether we can now go into all the points which we have heard stated to us; or, if we are prevented from entering into them by the *res judicata* of a former judgment. Res Judicata.

"Upon this nothing has been stated in argument here; but this appears to have been much relied on by the Judges in the Court below. Lord Roberston was of opinion that there was a *res judicata* here. Lord Glenlee does not coincide in this, but has difficulty on the point of *noviter repertum*. Lord Craigie thinks there was a *res judicata*. Lord Bannatyne is of a contrary opinion.

* Taken by Mr Robertson.

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The Lord Justice-Clerk again inclines to the opinion of *res judicata*. Thus four out of five of the judges appear to favour the opinion of *res judicata*.

Noviter Repertum.

"On the point of *noviter repertum*, treating this as a question of Scots law, I should say that if there be a *res judicata* here, it would be difficult to get rid of this by an allegation that this instrument of sasine, which was always in the possession of the pursuer, could be held as *noviter repertum*. But this matter is involved in another question, namely, Whether the former action was not withdrawn in such a way as to preclude the giving the character of *res judicata* to the former decree.

"Another point occurs with regard to the meaning of the word *earldom* in the summons. Reading this as an ignorant man would read it, the word would be held to mean the Peerage; but in this jurisdiction the peerage is not to be dealt with.

"I have no conception that the judges of the Court of Session meant in any way to deal with the Peerage in this case. Whether or not it will be necessary to take any notice of this, I do not say at present. But when we come to decide this case, it will not be duly considered, if we do not at same time keep in mind that while we are deciding only as to the estate, still, from the nature of the evidence, it will be very difficult to prevent the right of succession in this title from being affected in some way by our decision.

"Whatever is done as to this, it must be clearly and distinctly understood, that nothing that we do in this case is to decide anything in regard to the Peerage.

Sasine with words "*filius carnalis*."

"There are other three points, 1st, The question upon the sasine of 1499; and it appears to me that that sasine, on certain principles, whether the charter be produced or not, may be held as evidence that Mark Ker was termed "*filius carnalis*" of Walter Ker.

"What was the meaning of this term, is a more difficult point. The Court has thought that this was an ambiguous term, and has held that unless it could be shown that the term had a fixed sense, its meaning here must be decided upon other circumstances.

Import of these words.

"I put a case to the Attorney-General upon this subject. Supposing this word to have occurred in this deed only after it had received an interpretation in the civil law writers which have been stated to us, must it not have been held that the meaning was, as these writers had laid down? It is true there might have been a subsequent usage to alter this.

How that import was to be ascertained.

"If the expression be ambiguous, we must let in evidence of all kinds to show its meaning; the reputation of this person in his family; other instruments in which the same expression occurred, and great variety of topics, which were stated at the bar, and many more which might be suggested.

" It becomes a question of evidence at last. And when we are called on to say on whom the burden of proof lies, I have not much difficulty as to this; deciding here as a judge of the Court of Session, or as a juryman, I conceive, I must decide upon the facts *appearing* before me. These facts it will be necessary for a person to weigh calmly in his closet, before being ready to decide thereon.

" If we shall come to the conclusion, that this sasine proves Mark Ker to have been a bastard, then we shall get to an end of the cause, but if not, then we shall have two other questions to consider.

" One of these is, Whether John Ker, the son of Sir John Ker, was legitimate or not? Certain of the facts on which this question depends are not in dispute; Sir John Ker, the father, was divorced from his lady, for adultery with the wife of a certain gentleman; and this gentleman having also divorced his wife, the adulterous persons afterwards intermarried.

" It is said that this was an unlawful marriage in this sense, that it was null and void *ab initio*. If unlawful in any other sense, it might not affect the legitimacy of the issue.

" This question depends on the canon law, the civil law, the decretals of the popes (which, I see, it was the fashion to abuse), but more especially on the Act of Parliament of Scotland of 1592. If this was an unlawful marriage as being null and void, then nothing else will remain for discussion; but, if otherwise, there will be a question, if John Ker, the son, was to be held a lawful son of the marriage, or not. If the marriage was lawful, I think it will be extremely difficult to hold in regard to this person, considering all the documents which are before us, that he was an unlawful son.

" As I have said, it will be necessary to consider all the matters fairly and calmly. I trust I have not troubled your Lordships at present too much at length. When we are ready to proceed, further notice of this will be given to the agents on both sides."

Case Resumed 17th May 1822.

The LORD CHANCELLOR (ELDON) said

" My Lords,*

" This case, which is between James, Duke of Roxburghe, and Lieutenant-General Walter Ker, comes before the House upon two appeals, in each of which James, Duke of Roxburghe was the appellant, and Lieutenant-General Ker was the respondent. Upon the *first* of these appeals very little was stated at your Lordships' bar; and I shall have occasion to mention what the substance of that appeal was, and then I shall represent the substance of

* From Mr Gurney's short hand notes.

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THE DUKE OF ROXBURGHE v. KER.

the second appeal, and what is the view I take of this case. I believe I shall entirely act within your Lordships' rules, which in some instances may make it more prudent and discreet, and a better judicial mode of proceeding, if I were simply to state in one word my opinion of the case; but I do not think I can do justice to a case of this sort, without calling a very short portion of these proceedings to your Lordships' attention.

Describes the circumstances of the case.

"My Lords, you will find, from what is stated in the case of the respondent, that upon the death of William, Duke of Roxburghe, in 1805, Lieut.-General Ker, as your Lordships well recollect, laid claim to the honours of that family in a competition that took place at your Lordships' bar, for nearly the whole of one session. It was opposed, and ultimately successfully opposed, by the appellant, the Duke of Roxburghe. The appellant was descended from one of the grand-daughters of Robert, first Earl of Roxburghe, who died in 1650. The respondent claimed in the character of heir male of the Earl and of Harry, Lord Ker, his son. Sometime before the death of William, Duke of Roxburghe, the respondent, in order to establish his title to insist for the registration of the entails of the Roxburghe estates, had been served heir male of Robert, first Earl of Roxburghe, and of Harry Lord Ker. After the competition arose on Duke William's death, the appellant, then Sir James Norcliffe Innes, in December 1805, brought an action of reduction for setting aside those services. In the case for the respondent now before your Lordships, it is stated that the appellant very anxiously protracted the proceedings, and retarded the decision;—that in February 1811, the cause was ordered by the Lord Ordinary to be submitted to the Court, against which interlocutor the appellant gave in a representation and then a petition, both of which, according to the statement of the respondent, were refused without answers. A memorial was then given in by the respondent, in which he repeated and corroborated the evidence which had formerly been submitted to the jury, and had formed the ground of his services. It states what the evidence consisted of, and it is represented in both cases, that is, in the respondent's case in the second appeal, and in the appellant's case in the first appeal, that the appellant presented a petition praying for leave to withdraw the action, the Court did not refuse this, but pronounced this interlocutor:—'Having heard 'this petition, in respect the petitioner has desired to withdraw 'this action, allow him to do so, and assoilzie the defender and 'decern: Find the defender entitled to his expenses.' My Lords, the Duke of Roxburghe was advised to bring a new action, or to take some steps with respect to this interlocutor; and the way in which he states it in his first appeal, is precisely in the terms in which I have stated it, namely, in these words (here the above interlocutor was read). And by that interlocutor they also found

that the defender was entitled to his expenses, and they allow an account to be given in, and remit to the auditor to tax the same and report. That account was accordingly given in. Then there is another interlocutor likewise appealed from, to this effect:— 'The Lords having advised this account of the expenses, with the 'auditor's report thereon, approve of the said report, and in terms 'thereof, modify the account to the foresaid sum of L.273, 13s. 8d. 'sterling, and decern for that sum with the full dues of extract;' and then the appellant states, as in the case laid upon your Lordships' table, that he was advised in 1811, that the said interlocutor of the Lords of the First Division of the 11th December 1811, in so far as it went further than to grant the prayer of the petition for leave to withdraw his action of reduction *simpliciter*, and assoilzied the defender, and found him entitled to expenses, and the said other interlocutor of the Lords of the same Division, of the 10th of March 1812, founded thereon, were erroneous; but he did not conceive this to be matter of much importance. Afterwards, however, the appellant discovered that there existed no other person who could or did pretend to be heir of entail of the estate of Roxburghe, except the respondent, and he brought a new action of reduction of the services. I should mention that this new action of reduction was brought before the petitioner's son came into existence, and I mention the circumstance with a view to this observation in this second appeal, at the time the second action was brought, in as much as if he could make out that Walter Ker was not the heir male of the family, he would then be the last heir of entail to the Roxburghe estates, in fee simple. Then he brings a new action, but conceiving that from the manner in which the Court of Session had expressed the interlocutor, it might be considered as a *res judicata*, his complaint is, that the Court ought to have done nothing but to have allowed the action to be withdrawn, and undoubtedly, as it is stated in the notes upon the table, in the observations which are made upon this case, this is an extraordinary interlocutor, and one hardly knows how to deal with it. It was an action of reduction to reduce the services of Walter Ker. The Duke of Roxburghe was disposed to withdraw the action altogether; and he applies to withdraw the action; and then they give a judgment which one does not know how to apply to the species of application. The action being withdrawn, the Court goes on to assoilzie the defender, and to give the expenses, which seems to amount to this, that there shall be no action, because the Duke of Roxburghe desires to withdraw it, yet there shall be an action out of which the defender is to be assoilzied, and his expenses to be paid.

"My Lords, I have stated this because the other case contains, on the part of General Walter Ker, one defence, that the interlocutor is to be considered as a *res judicata*, and therefore that the

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other action could not be carried on. The ground of that action of reduction is stated in the summons, which I now take the liberty to read to your Lordships.

(Here his Lordship read the summons of reduction; he also read the reasons of reduction as follows):—

"'*Primo.* The foresaid two services and retour and decree are 'erased and vitiated *in substantialibus*, and the said extracted 'decree disconform to its warrants.

"'*Secundo.* The said services proceeded in absence of any con-'tradictor, and without evidence to prove that the defender was 'at all lawfully connected with the foresaid Robert, Earl of Rox-'burghe, and Harry, Lord Ker, his son.

"'*Tertio.* The defender could not then prove, nor can he now 'prove, that he is in point of fact heir-male of the said Earl Robert 'or Lord Ker, his son.

"'*Quarto.* The decree of absolvitor before mentioned, is irre-'gular and null, and did not proceed upon consideration of any 'evidence of the said Walter Ker's pretended propinquity to the 'said Earl and his son, but upon a petition from the present pur-'suer himself in the foresaid action, praying, for certain reasons, to 'be allowed to withdraw that action, and which did not warrant 'or authorise any decree of absolvitor.

"'*Quinto.* The pursuer had now recovered evidence, which, if 'it were incumbent on him to bring any (which he by no means 'admits), would be sufficient to instruct, that if the said defender 'was at all connected with the said family of Roxburghe or Lord 'Ker, it was by a bastard line.'

Title to sue.

"Now, my Lords, your Lordships will observe, that if Sir James Innes Ker is such heir as he states himself to be in this summons, he has an undoubted right to sue in an action; and, I do not presume to say, that this may not be sufficient in Scotch proceedings, though, I confess, I feel myself more distressed in determining upon the proceedings than upon the points in discussion. If this had been a proceeding here, the Court would not have taken the facts of certain instruments for granted, merely because there happened to be a cause at this bar in which we were obliged to travel through them, and to have the particulars entered into. How it is made out that this action of reduction gives to the pursuer the character which he assumes, I pretend not to decide; it, however, is enough to say, that it is matter of litigation between the parties, whether he has a title as a pursuer? And in the case that is laid upon your Lordships' table, there is a difficulty to reconcile the statements of the grounds upon which he founds his right to pursue with regard to that service. Then, your Lordships will observe, it is assumed that all those services, and retours, and decree, ought to be reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of our said

Lords, to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect, with all that has followed or may follow thereon, and to make no faith in judgment or outwith the same; and it ought and should be found and declared, by decree foresaid, that the defender, in his pretended character of heir-male of the said Robert, Earl of Roxburghe, or Harry, Lord Ker, his son, has no claim against the pursuer, or to the earldom and estates of Roxburghe possessed by him. Now, here again, another observation arises that the earldom is no where mentioned before, though the character of the earl is mentioned frequently; therefore, a difficulty arose to know what was meant by this word 'earldom;' but taking it to be clear that it means nothing but a sort of territorial description of property, there is no ground for saying that this was an action on the part of the Duke of Roxburghe, praying the decision of the question whether General Walter Ker had or had not a right to claim the title? It was a mere description of landed property. This being the nature of the pleading; *first*, it is said, that the summons is not sufficient. I believe *that* was more pressed by myself than could be justified upon reflection; for making allowances for the differences in the laws of England and the laws of Scotland (in the one you have pleadings so brought down to the point, that you can tell what it is which the party brings before you, in the other you have them so loosely stated, that you cannot tell what they are until the party tells you what is in dispute),—allowing for that small difference which exists in the mode of English and Scottish pleading, I should be sorry to express a strong opinion upon this case, merely on the ground of any doubt of the sufficiency of the pleadings, where neither counsel nor judge suspected such an objection could be made.

"There is then another question between the parties, and that is, Whether the pursuer is not barred by a *res judicata*; that is to say, Whether in the former action which he thought proper to withdraw, the judgment given is to be considered as a *res judicata* (and your Lordships will see in a moment why he wished to withdraw). By the interlocutor in that action, the judgment of the Court, in so far as it went to assoilze the defender, and to order expenses, I confess was a judgment that has thrown me into considerable embarrassment; for if a person in this country had desired to withdraw his suit in Chancery, the bill would have been dismissed upon paying costs, but you would not have given a judgment as if the cause had remained. But here leave is given to withdraw the action, and judgment to assoilze the defender. With respect, therefore, to this matter of *res judicata*, if the cause were to be decided upon that point, I think we ought to pause considerably before we said that this was a *res judicata;* for this reason, because, though I do not think it was a *res judicata* (for it was not a

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judgment where the Court disposed of the merits of the cause), yet I should feel very great difficulty in not taking more time to consider of it. If the case were to be decided upon that point, for though the judges were unanimous upon the other points, four of them differ upon this, and one after the other seems to have thought that this was a *res judicata*; but whether the summons is good or bad, or whether it is to be considered as a *res judicata*, if there be other grounds on which the judgment of absolvitor in this action can be maintained, then the absolvitor will be right on those grounds; if, on the other hand, it is not good, and this be not a *res judicata*, yet if on other grounds the judgment ought to be affirmed, we need not trouble ourselves whether this be a good or bad summons, or whether it be a *res judicata* or not.

Bastardy of Mark Ker, &c.

"Now, my Lords, having stated this much, the other points in the case are these: The Duke of Roxburghe says that, supposing you make yourself out to be heir male by a pedigree which admitted of no doubt whatever, yet the fact is this, that you cannot be an heir male unless you can show that a person of the name of Mark Ker, who, in this pedigree, is stated as a brother of Sir Robert Ker, and second son of Sir Walter Ker of Cessfurd, was a legitimate child, or if I can show he was *not* a legitimate child; for if he was illegitimate, then your descent is from a bastard, and the consequence is, you cannot be heir male of a person who goes higher up in the line. He says further, if you do show that Mark Ker was legitimate, and if I fail in showing that he was *not* legitimate, yet there is another bar to your character as heir male, namely, that a person lower in the pedigree (Sir John Ker) happened to do *that* in Scotland which seems, at that time, to have been considered as nothing of a very loose or immoral nature,—in short, that Sir John Ker happened to commit adultery with another man's wife, and afterwards married the woman; the issue, it is said, of that marriage being unlawful, therefore all that descended from him, descended from an impure fountain, and were barred from inheriting.

Marriage between adulterer and adulteress illegal, and issue unlawful.

"Now, my Lords, to go through all the learning and learned argument which your Lordships have before you upon the table, and all which you have heard from the bar, or even to attempt to go through the observations that might be called for, if your Lordships were about to reverse the judgment, would occupy more of your time than I should feel disposed to do; without, therefore, going through the whole of the most powerful and learned arguments (for your Lordships have heard four counsels, and I should not do justice if I did not say so of both young and old), the question, I think, may be stated in a very few words, and indeed, according to the practice of your Lordships' House, I ought not to do more.

"There is found a grant to this Mark Ker, dated 1449, and a

very extraordinary thing it is, that this instrument which is found in the charter-chest at Fleurs never made its appearance till this action of reduction. It is not in the right custody, because it relates to property not enjoyed by that line in whose possession the instrument is found, but by this line. There is reference in it to a charter which is not produced. That a charter existed is demonstrated partly by the instrument itself, and partly by other proofs in the cause; but whether the charter did or did not exactly correspond to the contents of that instrument of 1449, is a thing which we are rather to conjecture, and to believe, than to say it is a proof. It is, however, necessary to read to your Lordships that instrument which is the foundation of the whole of this branch of the case. It is in the following words: 'Per hoc presens publicum 'instrumentum cunctis pateat evidenter et sit notum quod anno,' and then follow a great many Latin words, stating the date of it, which is most material: 'In mei notari publici et testium subscrip-'torem præsentia personalia constitutus nobilis vir Walterus Ker 'de Cessfurd ac dominus terrarum de Borthik schelis,' and there is a great dispute whether those lands are in the possession, or have been in the possession, of this line,—a dispute with which I do not trouble myself. It does not appear they were lands in their possession, 'accessit personaliter ad *hujusmodi* terras et ibi-'dem per terræ et lapidis traditionem ut moris est, statum seisi-'nam et possessionem hereditarium quinque libratarum terrarum 'suarum vulgariter nuncupaturum le Marys et aliarum quinque 'libratarum terrarum suarum dicti dominii de Borthik schelis ex-'cepta una acra.' Then it describes the situation of them, and then come the words: 'Marco Ker suo filio carnali suis que heredibus 'masculis et assignatis in feudo et hereditate in perpetuam, justa 'et secundum suæ certæ formam et tenorem sibi de super confect 'salvo jure cujuslibet tradidit et deliveravit,' that is, this a donation by which Walter Ker, the father, delivered the lands to Mark Ker, as a *filius carnalis*. It is then signed by the Notary Public; but it is an instrument not signed by him who it is said granted these lands to Mark Ker, 'suo filio carnali suisque heredibus mas-'culis et assignatis in feodo hereditate in perpetuam,' etc. This objection was carried so far, together with the sasine being found in the charter-chest at Fleurs, as to say, that it was no evidence; I cannot, however, say this; but it is an observation justified by the fact, that the charter-chest contained no other than this instrument applying to Mark Ker, or any of his descendants. My Lords, it is upon that principle—upon the weight due to this instrument,—that your Lordships are called upon, in an especial manner, to say that Mark Ker was illegitimate, and your Lordships have had many able and curious arguments addressed to you with a view to show what is the meaning of the words '*filio carnali*.'

Sasine with the words "*filius carnalis*."

Import of these words, how to be ascertained.

"My Lords, the opinion I have formed upon this subject is this,

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Presumption of legitimacy, how inferred.

first of all, I think that the presumption is to be made in favour of legitimacy, especially of a person who existed 200 or 300 years ago, if upon looking through the transactions of the family descended from him, and the family connected with him, there has been no cogent evidence to show that one branch of the family did not consider another branch of the family as springing from an illegitimate source; but instead of doing so, took one another as individuals coming from a pure source. I agree, certainly, that if this word '*carnalis*' has necessarily, in the language from which it is borrowed, the sense of illegitimacy,—if 'carnalis' necessarily, in that language, signifies illegitimacy, cadet questio; but if it be, on the other hand, an ambiguous term, which, in some cases, is applied to legitimacy, and in other cases to illegitimacy, then, I say, if you can show, either from the instrument itself, that it is to have the sense of legitimacy, or from other instruments, it is to have that sense, or from other species of proof that it is to have this sense, then, I say (if it is an equivocal word), you ought to give it *that* sense. Now, to try this in this case, suppose this was the first instance in which this word occurred in Scotch deeds, then, my Lords, I undertake to say, that you could not presume that the word '*carnalis*' did mean illegitimacy, unless you could also show that it was used in that sense in the language from which it was borrowed. If you look to the language from which it is borrowed, it by do means imports any such thing; the consequence of that is, that if the word '*carnalis*,' in the first instance, could not be taken to mean illegitimate, because it could not be shown that '*carnalis*,' in the language from whence it was borrowed, meant illegitimate; I do not mean if it is shown to be so by the contents, or by other instruments, that it means illegitimate, or by other proof that it has that meaning, and was so used, (for certainly there might be a great many instruments relative to other property, in which it might be shown that it was necessarily meant to imply, and to denote, illegitimacy),—that it is *not* to be so taken. I feel very great difficulty in determining positively one way or the other that it means legitimacy or illegitimacy; but if, in the language from which it is borrowed, it does not seem to be taken so, then, I say, that there ought to be that course of dealing with the word, by the Scotch conveyancers, as to leave no doubt of the sense in which the word is used. The use of the word seems to have occurred about the 15th century down to the 16th century. It seems to have been employed by conveyancers, many of whom, no doubt, were extremely ignorant. The word might be used for that number of years. To say that a word which did not necessarily mean illegitimacy, is to have its sense totally converted, totally altered with respect to the Scotch law, and is, in Scotch language, to mean illegitimacy, unless it be shown not to mean so in every case in which it is found to occur, does seem to me to be a very danger-

ous principle to adopt in reference to the purity of the descent of families. I am ready to admit that in much the greater number of instances in which this word is used, it is intended to apply to persons who are illegitimate; but, in some of the instances, the term is applied to persons who are legitimate. That again brings the question to this, as it appears to me, that, unless you have more cogent evidence than you have, in this case, to prove that Mark Ker was illegitimate, viewing the whole transactions of his life, the great situation he held, all the connections he formed in life, and every other circumstance attending his status in life, and what is called the status of his family (for I do not agree that there could be merely a status of an individual, but a status from whence the descent has sprung), I cannot think, with these before me, that this word 'carnalis' is sufficient evidence to entitle us to say necessarily this person was illegitimate. I could not go through all the evidence. I do not go through all the instruments here; if I did so, I should have to request of your Lordships to grant me the whole of the remaining part of the session."

"I ought to mention here, that the legitimacy of Scotch families, and the purity of Scotch character, are very much wronged in the question, if we are to resort to some of the arguments urged at your Lordships' bar. They would go to prove that the word 'filius carnalis' applied to illegitimate children; but are you to say, that a term which may apply to legitimacy, or which may apply to illegitimacy, that for that reason you are to contend for the legitimacy, and they are to contend and prove it may mean illegitimacy, because no other words are used to describe a person who was illegitimate. This is not an unimportant observation, for if we look to the instruments found here, these prove that years after the date of this deed of 1449, or 1500, or 1501, or 1502, this man is described as a son, and such a one, in which a man in the ordinary way would be described, and in some of the instruments he and the family stand in limitations before the other branches of the family, who unquestionably were legititmate; and though it is very ingenious to give an answer to this, and to say it may become necessary, and that those connected are bound to take care of the illegitimate children (I do not use the word 'natural,' for it requires some caution to use it, until we come to a judgment upon it in this House);* but it is a very ingenious answer to say, that as these are illegitimate children, therefore the father limits to them before he does to the legitimate children; but those persons who are connected with the family, who have no such feelings towards them, it is, I say, unusual for them, when they portion out their estates, to limit to the illegitimate line before they limit

* Alluding to the case of the Borthwick Peerage.

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to the legitimate line; and we may argue for ever upon all the probabilities, and upon all the improbabilities which may arise out of the transaction; but the principle I go upon is this,—I say, till that instrument, dated 1449, was found in the charter-chest at Fleurs, this objection was not heard of; and, it is to be observed, that no other instrument of a similar description was found there; I say, the whole of them, with the exception I am about to mention, which does not touch the question, had, when in this world, the status of legitimate persons, and you are not to take away that from them unless you possess cogent evidence for doing so. I am therefore of opinion, whatever difficulties may hang about this case, that from the evidence laid before your Lordships, you are not authorised in concluding that Mark Ker was an illegitimate child.

Marriage between adulterer and adulteress, whether lawful in this case.

"Then there is another point, my Lords, namely, Whether this marriage that took place between this adulterer and adulteress was a lawful marriage? If there was nothing to be seen in the case except the judgment of what may be called the Consistorial Court of Scotland—if there were nothing except that proceeding, in which, it is stated, to have been a collusive case, I certainly should have felt extreme difficulty in saying that the Act of 1592, or that proceeding in the Consistorial Court, did not lead one to the conclusion, that it was an illegal marriage; and that the offspring were not descended from a pure source. But upon looking at the proceedings which are here printed, and to that dispute, which existed between the parties on that subject, it does not appear to me that the judgment can be considered as a judgment of any considerable weight, as proving the legality or illegality of the marriage; but when I look to what has passed since—when I look to the charters—to the services of the persons descended from that marriage—when I look to the description of those persons in the subsequent charters,—and when I read the Act of Parliament of 1600, I say *that* is of more weight than all this judgment in the Consistorial Court of Scotland put together (for this Act of Parliament has more weight than any argument that can be brought from these judgments, and from the former Act 1592); because, when the Scottish Parliament say they enact that all marriages thereafter contracted under certain circumstances, shall be null and void, it does appear to me to be a most difficult thing to say that all marriages of a similar kind which were before contracted, were null and void. I am therefore of opinion, that what is stated upon this part of the case is also right.

"Your Lordships know, likewise, it is to be considered that the Act 1600 is a material Act in another point of view; for it not merely enacts that marriages between such persons are null and void, but that it must be declared by the sentence of the Court to be a nullity before the marriage can be held to be null and void.

A gentleman of great experience at the Scotch bar, I mean Mr Clerk, informed your Lordships what seemed to amount to this, that this Act might well be out of the Statute-Book altogether, because in Scotland they contrive that the adultery shall be so cleverly committed, that the Consistorial Court cannot get at it, and the man marries the woman. Now, if it requires that sentence shall follow to make that marriage null and void, it would be a strong thing to say, because the marriages after the passing of the Act were to be null and void, that the marriages before this Act passed shall also be null and void, without this particular character to give them nullity.

"Upon these grounds, my opinion is, that this judgment ought to be affirmed. Indeed, Mr Attorney-General, who argued this case, as he does every other, most ably, seemed to think that the utmost he could ask your Lordships to do, would be to send it back to the Court of Session again. I do not think this is a sort of case to remit for the purpose of ascertaining the meaning of the words, '*filius carnalis*.' It need not, I think, be discussed over again; and if the reason be right which I have stated, as founded upon the Act of 1600, I think your Lordships would not be acting usefully in further drawing into suspicion that legitimacy, not a single word of which was heard of until within a very few years, that is entitled to any sort of credit, because the words '*filius carnalis*,' occur in an instrument found in a place where it ought, strictly speaking, not to have been, and where there is no other instrument to the same purport—no other document relating to this family, which speaks the same thing that *that* instrument is said to purport.

Under these circumstances, I move your Lordships that this judgment ought to be affirmed. In what terms it would be best to settle it, may be arranged before your Lordships meet again, which probably will be Wednesday next; Monday being the last day of term, I must ask your Lordships not to hear any causes on that day.

24th May 1822.

LORD CHANCELLOR ELDON said,

"My Lords,

"In the case of the Duke of Roxburghe *v.* Ker, having seen the agents, I understood that the first of those appeals is to be withdrawn.* Taking it for granted that this will be done, I have in the next place to move your Lordships to find, in the second appeal case, in which it has been insisted on the part of the respondent, among other matters, that the appellant is barred by

* There was an appeal brought in each of the actions described at p. 825.

APPEAL.—(2). An objection to the competency of an appeal on the Act 55 Geo. III., as to granting a new trial in Jury Causes, sustained as to two of the interlocutors.—Clark, &c., *v.* Callender, &c., 16th June 1819, p. 422.

——— (3). In an application by a bankrupt for his discharge, which was granted by the Court of Session, and affirmed in the House of Lords, the Lord Chancellor, Eldon, doubted the propriety of appeals in such cases, but held the appeal competent.—Stirling Banking Company and Marshall *v.* Stein, 27th May 1803, p. 809.

ARTICLES of Roup.—*Vide* Building Plan et Deviation et Plan.

ASSIGNATION.—Held that a co-obligant insisting on an assignation from the creditors, holding a separate security over his co-obligants' separate estate, in order to operate relief against that estate for sums drawn out of his estate, more than out of it, was not entitled to demand an assignation in the circumstances of this case.—Henderson (Garbett and Company's Trustee), &c. *v.* Glynn, Hallifax, & Co., and Chas. Selkrig Esq., 26th June 1816, p. 207.

ASSIGNEES and sub-tenants. — *Vide* Lease, No. 1.

AUGMENTATIONS.—*Vide* Teinds, No. 1.

BANKRUPTCY.—(1). In the bankruptcy of a company concern, it was, after a silence of thirty years, disputed, whether the individual estate of a partner had been included in the sequestration of the Company. Held, that after so long a silence, it was impossible to hold that the sequestration extended to his individual estate.—Henderson (Garbett and Company's Trustee) *v.* Glynn, Halifax, and Company, et Chas. Selkrig, Esq., 27th June 1816, p. 207.

——— (2). Heritable bonds granted long before bankruptcy, but no infeftment taken upon them, until within sixty days thereof; were held ineffectual as preferable securities, and to fall under the Act 1696.—Murray, &c. *v.* Charteris, &c., 3d April 1734, p. 668.

BANKRUPTCY.—(3). A contract entered into by the trustees on a bankrupt estate, with concurrence of the creditors, was held not reducible on the allegation not proved, that it was entered into without due authority, and to the hurt of the creditors.—Henderson (Garbett and Company's Trustee) *v.* Chas. Selkrig, 27th June 1816, p. 198.

——— (4). A bankrupt made an application, with the usual statutory concurrence of his creditors, for his discharge. It was opposed by some of his creditors. Held the opposition to be groundless. Affirmed in the House of Lords.—Stirling Banking Company and Marshall *v.* Stein, 27th May 1803, p. 809.

BASTARDY.—In the competition for the Roxburgh estates and honours, a sasine was found in the charter-chest at Fleurs, which described Mark Ker, the person through whom General Ker claimed the honours and estates, as a "*filius carnalis.*" Held, that this was not conclusive evidence of his bastardy, and that the presumption was for legitimacy, especially of a person who existed 200 or 300 years ago, and where, in looking through the transactions and deeds of the family, there was no evidence to show that he had been looked upon and dealt with as illegitimate. Opinion expressed that the word "*carnalis,*" being ambiguous in its terms, and being capable of a different meaning in the language from which it was borrowed, the presumption of legitimacy was the more irresistible.—Duke of Roxburgh *v.* Ker, 22d May 1822, p. 820.

BENEFICIUM Ordinis.—Held, that a cautioner in a bond, who bound himself not only as "surety," but also as "principal payer," was not entitled to plead the privilege of discussion.—Earl of Traquair and

Trustee *v.* Burrows and Others, 20th March 1815, p. 99.

BILL.—(1). A party agreed to accept a bill on certain conditions agreed on. He paid one half of the bill according to the conditions and terms agreed on, but refused to pay the other half until the condition of delivery of the oats, for which the bill was granted, was complied with. Held him liable for the second half of the bill. Reversed in the House of Lords.—Craig *v.* Howie and Attorney, 5th March 1817, p. 261.

——— (2). The appellant sent three bills to the respondents (with whom he had dealings in business), for the purpose of negotiation and payment, indorsing them for that purpose. The respondents delayed timeously to present the bills for payment, and failed otherwise in duly negotiating the same, but they sent them to Boyd, in Glasgow, with whom they had dealings, who failed with the proceeds in their hands. Held (1), That there was no culpable negligence on the part of the respondents, to subject them in liability; and (2), In regard to a sum of £200, sent by Boyd to Haliburton, on 25th March, sought to be imputed *pro rata* of this debt, this remitted to the Lord Ordinary. In the House of Lords reversed, and held the appellant entitled to credit for the three bills as from 25th March 1762, when they were recovered.—Brebner *v.* Haliburton and Company, 13th Dec. 1763, p. 753.

BOND.—Circumstances in which a notarial copy of a bond granted in Spain, together with other evidence, was sustained as proving the constitution of the debt.—Earl of Traquair and his Trustee *v.* Burrows and Others, 28th March 1815, p. 99.

BUILDING Plan.—(1.) The articles of roup, in the sale of feus for building, referred to a plan, which specified the houses to be of a certain elevation, uniform with each other. In a suspension and interdict, held, that the parties had not in substance deviated from these conditions as to building, although a deviation of 3 inches in the height had occurred. —Jameson *v.* Russel, &c., 17th June 1814, p. 29.

BUILDING Plan.—(2). *Vide* Property, Nos. 1 and 2.

——— Contract, (3). Circumstances in which, in a building contract, extra charges were sustained —Hay *v.* Scott, &c., 21st Feb. 1816, p. 146.

BURGH, Magistrates of,—*Vide* Damages, No. 7.

CANCELLED Deed.—*Vide* "Deathbed." No. 1.

CAUTIONARY Obligation.—(1). *Vide* "Guarantee."

——— (2). Held, that a cautioner in a bond was not entitled to plead the privilege of discussion, he being bound not only as surety, but also as principal payer.—Traquair &c. *v.* Burrows, &c., 20th March 1815, p. 99.

——— (3). Bills were guaranteed by sureties, and the creditor, after they fell due, took other bills from the debtor, and gave up those that were guaranteed. Held, that one of the cautioners, whose consent had not been obtained to this, was liberated and discharged from liability. Stirling *v.* Forrester, &c., 19th March 1821, p. 817.

CASTING Vote.—In the election of a minister to the parish of Cadder, the presentation to which was vested in the whole heritors, held, that the preses of the meeting was not entitled to a casting vote in the election, unless this was expressly conferred upon him, either by the trust, or by the meeting, and his casting vote set aside.—Stirling and Others *v.* Campbell and Others (Lockerby of Cadder's case), 1st July 1816, p. 238.

——— (2), Held, in the election of Rector of the College of Aberdeen, that the Principal of the College was not entitled to a double or casting vote.—Thom, &c. *v.* Dalrymple, &c., 22d Feb. 1763, p. 738.

CARRIERS, Liability of.—Goods were lost by fire while on board a lighter at Greenock, to be conveyed to Glasgow. In an action for the value of the goods destroyed, against the owners of the lighter, held, that they were protected by the Act 26 Geo. III., c. 86, exempting shipowners from loss or damage to goods by fire. In the House of Lords, remitted, with a declaration that the Act founded on, did not apply to owners of gabbarts or lighters engaged in inland river navigation.—Hunter and Company *v.* M'Gown and Others, 12th July 1819, p. 460.

CHURCH.—(1). Held that the presbytery's powers were rightly exercised in ordering a new church to be built, and failing the heritors obeying that order, of proceeding themselves to get the church built, and decerning for the expenses thereof against the heritors. Affirmed in the House of Lords, with a declaration.—Sir David Maxwell and Others *v.* Robert Gordon, factor for the Presbytery of Kirkcudbright, 20th June 1816, p. 185.

——— (2). A difference of opinion having occurred in the Associate Synod of Burgher Seceders, in reference to the principles of their church regarding the power of the civil magistrate, and the ordination of ministers, the majority of the Synod had proposed an alteration of the formula, which was alleged to be a departure from the original principles. In a question as to the property and possession of the church, Held that the pursuers (appellants) had failed to condescend on any acts done, or opinions professed by the Associate Synod, or the respondents, by which they could call on the Court to say that they had deviated from the original principles and standards, and, therefore, had no right to disturb the defenders (respondents) in possession of the church. Affirmed. — Craigdallie and Others *v.* Rev. J. Aikman and Others, 21st July 1820, p. 618.

CHURCH Patronage.— *Vide* Patronage, Nos. 1 and 2.

CHARTER.—(1.) *Vide* Plan, (deviation from).

——— (2.) A party claimed a right of hunting and fowling in the forest of Birse, on two grounds, 1st, That he had, in virtue of his titles, such an interest in the forest, as to carry along with it the accessory right of hunting and fowling: 2d. By express grant, he alleged such right had been conferred on him over the whole forest. Held, (1.) That the express grant, which mentioned hunting and fowling, was inept, as being disconform to its warrant: (2.) That the mention of such a right merely in the *tenendas* clause of the charter, but not in the dispositive clause, could not give a valid right: (3.) That such a right could not be included within the clause *cum pertinentibus*, as it did not partake of that character, nor was it a natural incident to the right (servitude) ascertained to belong to the appellant. Affirmed.—Farquharson *v.* Earl of Aboyne, 22d April 1818, p. 380.— *Vide* Teinds, No. 3 as to second point.

——— (3.) *Vide* "College" et "Trust."

CLAUSE.— (1.) The Caledonian Canal Commissioners, in their Acts for making the canal, had powers conferred upon them to take stone, &c., from out the lands "of any person, "or persons, adjacent, or lying con-"venient thereto." The respondent's quarry was five miles distant from the line of canal, and in a different county from those named in the Act. Held, in the Court of Session, that the Commissioners had no authority under the Statutes to take possession of this stone quarry; but, in respect of a prior agreement, held them entitled so to take the stone of that quarry. Affirmed in the House of Lords, excepting as to the Commissioners' powers under

the Statute, which the House of Lords held it unnecessary to determine.—Caledonian Canal Commissioners *v.* Grant, 28th April 1815, p, 110.

CLAUSE.—(2.) Construction of do.—*Vide* Trust Settlement.

——— (3.) Prohibitory Clause against Sales.—*Vide* Entail, Nos. 2, 4, 7, 8, 26.

——— (4.) *Vide* Provision to Daughters, Nos. 1 and 2.

——— (General Destination).—*Vide* Settlement, No. 2.

——— As to the level in a Coal Pit. —*Vide* Lease, No. 9.

COLLEGE.—(1.) Held that the appellants, having deviated from the directions contained in the Charter of Foundation in the election of a Professor of Divinity in King's College, Aberdeen, the election was void and null.—Brown and Others *v.* Chalmers and Others, 14th March 1734, p. 663.

——— (2.) (1.) Held in the election of a rector in King's College, Aberdeen, that the Principal of the College was not entitled to a double or casting-vote, (2.). Held in the election of a civilian or professor of civil law of the College, that the respondent, Dalrymple, had the greatest number of votes, and that his election had been duly and regularly made. Affirmed on appeal.—Thom and Others *v.* Dalrymple and Others, 22d Feb. 1763, p. 738.

COMMONTY.— (1.) The Common of Glentilt and Glenfender, belonged in common to the Duke of Atholl and General Robertson, and was let to small farmers as pasture lands for pasturing cattle. The Duke's forests were in the neighbourhood, and the question arose, whether the Duke had right to give orders to his tenants to drive the deer off the Common, to the prejudice of General Robertson's right of hunting and killing the deer on the Common? Held that the Duke might do so.—Robertson *v.* Duke of Atholl and Another, his tenant, 1st Dec. 1814, p. 72.

COMMONTY, Division of.—(2.) In an action for division of commonty, objections were stated to the procedure of the Sheriff in taking the proof, and other procedure before him under remit of the Court, but these were repelled. — Robertson *v.* Duke of Atholl, 5th July 1815, p. 137.

COMPOSITION on Entry.—*Vide* Superior and Vassal.

COMPENSATION.—*Vide* Sale, No. 1.

CONCEALMENT.—*Vide* Insurance, No. 2.

CONDITIONAL Institution. — A party conveyed to his son, and his heirs, executors, and assignees, his whole heritable and moveable estate, including his "whole jewels, silver-"plate, pictures, marbles, alabas-"ters, &c., and all kinds of house-"hold furniture, and in general all "goods and gear belonging to him "at the time of his death." Of same date, he executed a deed, expressing his will and intention to be, that in the event of his dying without leaving heirs male of his body, the furniture, silver-plate, and pictures, in his mansion-houses of Dryden and Carnwarth, should go to the heir of entail succeeding to the estates of Dryden and Carnwarth, and assigned and disponed the same to these collateral heirs male accordingly. His son survived him, and executed a deed, bequeathing otherwise his moveable estate. Held that this was a conditional institution, and not a substitution, and that the son, on succeeding, was entitled to dispose of the property as absolute proprietor, in any way he might think proper.—Sir A. Macdonald Lockhart *v.* Lockhart's Executors, 1st July 1814, p. 31.

CONDITIONAL Acceptance.—*Vide* Bill, No. 1.

CONDITIONS of Sale.—*Vide* Sale, No. 3.

CONDITION Implied. — *Vide* "Provision" No. 2.

CONSTITUTION of Debt. — Circumstances in which a notarial copy of

a bond granted in Spain, together with other evidence, was sustained, as proving the constitution of the debt.—Earl of Traquair, &c., *v.* Burrows and Others, 20th March 1815, p. 99.

CONTRACTION of Debt.—*Vide* Entail, No. 1.

CONTRACT.—A contract entered into by the trustees on a bankrupt estate, with concurrence of the creditors, was held not reducible on the allegation (not proved), that it was entered into without due authority, and to the hurt of the creditors.—Henderson (Garbett and Co.'s Trustee) *v.* Selkrig (Fairholm's Trustee), 27th June 1816, p. 198.

——— of Sale.—(2.) *Vide* Sale.

CONTRAVENTION of Act.—*Vide* Act.

——— of Entail.—*Vide* Entail.

——— (2.) *Vide* Entail, No. 18.

CORRUPTION, Falsehood, and Bribery.—*Vide* Decree Arbitral.

——— (2.) *Vide* Decree Arbitral.

CRUELTY.—*Vide* Separation and Aliment, on the ground of.

DAMAGES for Muirburning.—(1.) In prejudice to the Duke of Atholl's right of deer hunting and muir game on Atholl Forest, over which the appellant, General Robertson, possessed a servitude of grazing his cattle, he (the appellant) set fire to the heath on that part. Held him liable in damages.—Robertson, &c., *v.* Duke of Atholl, 5th July 1815, p. 135.

——— (2.) A writer, who held a factory, was found liable in damages for failure to complete service, whereby a party was deprived of a liferent interest in an estate provided to him by his marriage contract. Reversed in the House of Lords. Thomson *v.* Somerville, 8th June 1818, p. 393.

——— (3.) For loss by fire of goods on board lighter.—*Vide* Carrier by Water.

——— (4.) For contravention of entail in regard to granting leases.—*Vide* Entail, No. 18.

DAMAGES.—(5.) An action of damages was raised for oppressive and illegal execution of a caption, for debt brought against the cautioner of the messenger and another, who was accessory to these proceedings. Held them liable in £100 of damages. Affirmed on appeal.—Grant, &c., *v.* Forbes, 29th March 1759, p. 731.

——— (6.) Circumstances in which a party was held liable in damages, who, in selling tobacco, as agent for a foreign house, had fraudulently abstracted part of the good tobacco, as it arrived from America, and substituted tobacco of an inferior quality; and this being proved, he was found liable in £1643, 1s. 4d., as the total loss.—Miller *v.* Alexander, 19th April 1758, p. 718.

——— (7.) At a time of famine, when meal was scarce, a riot took place in the Burgh of Hamilton, whereby the pursuer's granaries were broken into, and his meal carried off. Held the magistrates of the Burgh liable in damages as having failed and neglected to perform their duty as magistrates, on the occasion of the riot, and as having connived at the same.—Weir *v.* Naismith and Others, 3d March, 1743, p. 678.

——— (8.) For non-implement of sale of growing wood.—*Vide* Sale, No. 7.

DEATH, Presumption of.—Word was sent home by the officers of a ship of war, that Lieutenant Rutherfurd being under arrest to stand trial, had dropped overboard to escape to land, and was believed to have been drowned. Contrary rumours, however, arose to the effect, that he had escaped to land. Held, in the Court of Session, that this was sufficient presumption of death, but judgment reversed in the House of Lords on the merits.—Thomson *v.* Sommerville, 8th June 1818, p. 393.

DEATHBED.—(1.) Power was given, by an entail, to the heirs of entail, to provide their younger children with provisions, and to affect the estate

with the same, equal to three years' rents. The respondent's mother, the heir of entail in possession, granted bond to her younger children, and affected the estate therewith. While on deathbed, four years after she had executed this bond, she executed a new or second bond, to her younger children, in the same terms as the former one, with the view of giving the heir to the estate a longer time to pay the bond. The previous deed, it was said, she ordered the writer to cancel, when he went home, which he did, by tearing away the lady's name from the first and last pages, the same day as the second bond was executed. The heir of entail challenged the deed executed on deathbed. Held, that it was competent to look at the first deed, in order to support the second, as there was no evidence that Niven, the writer, had authority to cancel the first in the way he did, and, therefore, that the second deed was not reducible on deathbed.—Mure, &c., *v.* Mure, &c., 9th June 1818, p. 399.

DEATHBED.—(2.) A reduction was brought to set aside the settlement of the late Duke of Roxburghe, on the head of deathbed, by the present Duke. Held him to be barred from challenging the deathbed deed 1804, by the previous *liege poustie* deed of 1790, which had not been previously revoked.—Duke of Roxburghe *v.* John Wauchope, W.S., and Others, 25th May 1820, p. 548.

——— (3.) Marriage on Deathbed.—*Vide* Marriage, No. 1.

DEBT, Constitution of.—(1.) A notarial copy of a bond, granted in Spain, together with other evidence, was sustained as proving the constitution of the debt.—Earl of Traquair, &c., *v.* Burrows, and Others, 20th March 1815, p, 99.

DECREE Arbitral (1.)—A reduction was brought of a contract, a decree arbitral, a judgment of the Court of Session pronounced in terms of the decree arbitral, and a judgment of the House of Lords: Held that no relevant grounds in law had been stated for reducing these.—Robertson *v.* Duke of Atholl, 20th April 1815, p. 108.

DECREE Arbitral.—(2.) Held, that there were no relevant facts stated, inferring corruption, falsehood, and bribery, to warrant the reduction of a decree arbitral; and that any excess arising from the arbiter having gone beyond the matters submitted to him, ought not to affect the validity of the decree arbitral, further than to rectify the said excess, leaving the decree arbitral unimpeachable in all other respects.—Johnstone *v.* Cheape, &c., 10th July 1817, p. 339.

——— (3.) Held (1.) That a decree arbitral was not inept from defect in the prorogation of the submission. (2.) That the arbiter had exceeded his powers in deciding matters not within the submission, but that the decree was only impeachable, to the effect of rectifying the excess, and not to vitiate the decree arbitral *in toto*. (3.) That it was not a valid objection to the arbiter, that he had himself an interest in the matter in this case.—Johnstone *v.* Cheape and Others, 10th July 1817, p. 342.

——— (4.) Certain property was claimed, belonging to the Panmure family, which was settled by deeds of entail. Disputes having arisen, these rights were put in issue, and said to have been finally settled by decree arbitral. A reduction was brought of the decree arbitral; but the Court of Session repelled the reasons of reduction; and, on appeal to the House of Lords, doubts having occurred to the Lord Chancellor, as to whether this could be viewed as a regular submission and decree arbitral, or a mere transaction, his Lordship remitted the cause for further consideration. The Court of Session thereupon generally sustained the defences in the reduction. Reversed on the second appeal to the

House of Lords; and held (1.) That the instrument, purporting to be a decree arbitral, ought to be reduced; and (2.) That the interlocutor of Court, in 1782, was not to be considered as final and conclusive against the respondent, with respect to the leases in question. *Quoad ultra* affirmed.—Maule *v.* Honourable Ramsay Maule, 10th July 1819, p. 449.

DECREE of Sale.—The right to an heritable office had been purchased at a judicial sale, and the decree of sale expressly reserved the deputies' rights, "so far as they had right by the commission." The commission was found to be inept from vitiation in essentialibus: Held that this clause did not save their right from the exceptions pleadable against it. —Walker, &c. *v.* Gibson, 22d Feb. 1819, p. 441.

DEED.—*Vide* Stamp.—An agreement was written in the minute book of a society, by which the society conveyed to certain parties a right to a well on their property. Held the agreement good, although it was not written on stamped paper. Reversed in the House of Lords, on the ground that the agreement not being stamped, according to the Acts of Parliament, the same ought not to have been received as evidence of such agreement.—Brown and Others *v.* Murdoch and Others, 20th March 1815, p. 95.

——— (2.) Deeds reduced and set aside on the ground of incapacity, force and fear, and irregularities in the execution of the deeds.—Moffat *v.* Moffat, 19th June 1816, p. 181.

——— (3.) Held that a deed of entail had not been executed under the influence of fraud or compulsion, but voluntary on the part of the maker, and was therefore not reducible.—Hotchkis, &c. *v.* John Dickson, 19th July 1820, p. 615.

——— (4.) *Vide* Reduction of.—No. 5.

——— (5.) A marriage contract, although absurd and inconsistent in some of its clauses, yet as it was clear in the destination clause, it was sustained.—Murray *v.* Carlyle, 21st Feb. 1770, p. 780.

DELIVERY.—*Vide* Sale.

DEPOSITION of Witness.—*Vide* Witness, No 2.

DESTINATION in Settlement.—General clause.—*Vide* "Settlement."

DEVIATION from mode of cropping, stipulated by Lease.—*Vide* Lease. No. 2.

——— from Building Plan.—*Vide* "Building Plan" et "Property."

DISCHARGE.—An estate was conveyed by a post nuptial contract of marriage, to the husband and the heirs male, procreated of the marriage; which failing, the heirs male of the husband's body by any future marriage; which failing, to the heirs female, *and the heirs male descending of her body;* which failing, to the heirs and assignees whatsoever, of the husband. There was no issue male, but a daughter survived, who married a Mr Routledge. Before the father's death, she had entered into a transaction with her father, by which she renounced and discharged her rights under the contract of marriage; and the present question was raised, first by her son, whether his mother had vested in her a *jus crediti*, under the marriage contract; and whether, supposing she had, her discharge could affect the rights of succession of her son. Held, that she had vested in her a *jus crediti*, which she might discharge on full implement, or on terms of compromise, and that she had effectually discharged these rights, so as to bar the claim of her son.—Majendie *v.* Carruthers, 6th July 1820, p. 597.

DIVORCE for Adultery.—(1.) The plea of *remissio injuriæ* was sustained by the Court of Session; but in the House of Lords the case was remitted for reconsideration, with considerable doubts expressed, as to the judgment below, in consequence of there being no evidence that the

husband had probable knowledge of his wife's guilt at the time of the alleged condonation. — Fairlie *v.* Fairlie, 3d July 1815, p. 121.

Divorce.—(2.) A husband raised an action of divorce against his wife, on the ground of adultery, but did not withdraw himself from his house, where his wife chose to remain, after the summons was served on her. Held, that if the husband eats and sleeps separately, under the same roof, he is not held to cohabit with, or to be reconciled to her, so as to raise the plea of *remissio injuriæ* as a bar to the action; and, therefore, that plea in this case was repelled.—Stedman *v.* Stedman, 6th May 1742, p. 675.

Division of Commonty.—*Vide* Commonty.

Domicile.—The late Earl of Strathmore was born in England. He had a house in London, and had estates in England. He had also estates in Scotland, and a mansion house and servants there. The original dignity of the family was a Scotch Peerage; but the late Earl died, possessing both the rights of a Scottish and a British Peer. The marriage of the Earl was in England, and he had resided chiefly in England. In a question as to the legitimation of his children, born out of wedlock, of a lady whom he afterwards married on deathbed, Held him to be domiciled in England; and that the Scottish law of legitimation *per subsequens matrimonium*, could not apply so as to legitimate his children, born of this lady.—Bowes *v.* Bowes (Strathmore Peerage Cause), 29th June 1821, p. 645.

Election of Minister.—(1.) The election of a minister as assistant and successor, in the parish of Cadder, was vested in the whole heritors and elders of the parish. On the day of election 32 voted for Mr Grahame, and 32 for Mr Lockerby. The preses of the meeting gave a double or casting vote, for Mr Grahame. His election having been disputed; Held (1.) That the vote given for Ann Reid, a minor, then seventeen years of age, per mandate of her curator alone, without her signature or consent, was inept. (2.) That the objection to the vote of James Provan, was bad. (3.) That the preses had no right to a second or casting vote; and (4.), That the minutes of the meeting could not be looked at as unexceptionable evidence of what took place, from the alterations made on them by the clerk, after the meeting was over; and (5.), That the majority of votes was given for Mr Lockerby. In the House of Lords the interlocutors were affirmed, except as to the 2d and 5th points, which were remitted.—Stirling and Others *v.* Campbell and Others, 1st July 1816, p. 238.

Election (of Professor.) (2.) Held, that the appellants having deviated from the directions contained in the charter of foundation, in the election of a Professor of Divinity in King's College, Aberdeen, the election was void and null.—(*Vide* "College") Brown and Others *v.* Chalmers and Others, 14th March 1734, p. 663.

——— (3.) (of Professor.) (1.) Held, in the election of a Rector in King's College, Aberdeen, that the Principal of the College was not entitled to a double or casting vote; (2.) Held, also in the election of a Civilian of the College, that the respondent Dalrymple, had the greatest number of votes, and had been duly elected. Affirmed on Appeal, 22d Feb. 1763, p. 738.

Entail.—(1.) In the case of Sheuchan the question was, whether a proprietor of a fee simple estate, could make an effectual entail, placing himself under all the fetters thereof, so as to exclude his creditors; and whether the entail, in this case, contained an effectual prohibition against contracting debt? Held, generally, that the entail was not effectual against the creditors of Mr Vans, the maker, as to the estate of Barnbarrow. In

the House of Lords, remitted for reconsideration.—Agnew *v.* Stewart, &c., 29th July 1814, p. 60.

ENTAIL.—(2.) In the above case the Court refused to interfere to authorise a sale of any part of the estate of Barnbarrow, to pay the entailers' debts, the entail containing a strict prohibition against sales. Same case.

——— (3.) *Vide* Prescription of, No. 1.

——— (4.) An entail contained an express prohibition against selling, but the irritant and the resolutive clauses omitted to fence against sales, and the estate was sold. In an action brought by the next substitutes, to compel the heir, who sold the estate, to account for the price to the next substitutes, and to reemploy the same in the purchase of land, to be entailed in terms of the entail: Held, that a simple prohibition against selling the estate is good in a question between heirs; to the effect, that though Sir James Stewart might sell the estate, yet he was bound to account for the price to the next substitutes. In the House of Lords, the case remitted for reconsideration.—Stewart Denham *v.* Lockhart, &c., 22d March 1815, p. 85.

——— (5.)—*Vide* Prescription of, Nos. (4.) (5.) (6.) and (7.)

——— (6.)—(1.) A party possessing an estate on apparency, executed an entail, in which there was an obligation, binding his heirs "to "fulfil and perform the whole obli- "gations prestable by me at my "death." Held, that though he could not make an effectual entail, while in apparency, yet that the obligation, in the entail, descended, and was a ground to compel the heir of line to implement the conditions of the entail, and to make up proper titles in terms thereof; and (2.), That this obligation was onerous, and transmitted in terms of the Act 1695, c. 14, against the heir passing by and serving to the ancestor last infeft. Carmichael &c. *v.* Carmichael, 15th May 1816, p. 155.

ENTAIL.—(7.)—An entail contained a clause prohibiting "All or any of "the said heirs or members of tailzie, or their successors, to sell," &c. There was no express mention of the institute, as included within this prohibitory clause, although, from other clauses in the entail, it was contended, that he was included. Held, that under the terms, "all the heirs or members of tailzie," the institute, or disponee, was not included, and, therefore, that he had right to sell the estate. —Steele *v.* Steele, &c., 18th and 24th June 1817, p. 322.

——— (8.)—In the Neidpath and March entail, there was no prohibition against granting leases or taking grassums, but there was a prohibition "to sell, alienate, or "dispone the lands." There was a permissive clause, allowing the heirs of entail to grant leases for "their "own lifetimes or the lifetimes of "the receivers thereof," but "with- "out evident diminution of the "rental." The late Duke granted a lease of Harestanes for fifty-seven years, and took a grassum. Held (1.) That a lease for fifty-seven years was an alienation, and that it was not in the Duke's power to grant such lease. (2.) That a lease granted with a grassum taken, was also an alienation. Affirmed in the House of Lords.—Sir James Montgomery and Others (Executors of the late Duke of Queensberry) *v.* Earl of Wemyss, 12th July 1819, p. 465.

——— (9.)—(Alternative Leases.) In the Neidpath entail, there was no express prohibition against granting leases or taking grassums, but there was a prohibition to "*alienate*" the estate or any portion of the lands. A lease was granted for fifty-seven years, at a rent of £155, with a grassum paid of £300. Thereafter this lease was renounced for another lease for thirty-one

years, or for 29, 27, 25, 23, 21, or 19 years, for whichever of these periods the Duke might be found to have power to grant it. The Court would have sustained the lease for twenty-one years; but held, that as a grassum had been paid for the lease renounced, the new lease was to be viewed as a substitute for the former lease, and subject to the same objections pleadable against it; and that the conversion of any part of the rent into a sum instantly paid, was an alienation *pro tanto*, and struck at by the prohibition against alienation. In the House of Lords held that tacks granted partly for rent reserved, and partly for rent paid down, were not to be considered as leases let "without evident diminution of the "rental."—Sir James Montgomery and Others *v.* Earl of Wemyss, 12th July 1819, p. 482.

ENTAIL.—(10.) This is the same case as the above, namely, the case with the tenant of one of the farms (Edstoun), let as above described, and which case was decided in the same manner, although he pleaded that, as tenant, he was entitled to special favour; that he had entered into the lease in *bonâ fides*, and for onerous causes; and having obtained possession on that lease, he held a real right, which by express Statute was protected and good against all singular successors; and that his lease must hold good whatever was the result of the question between the Earl and the late Duke's executors.—Symington *v.* Earl of Wemyss, 12th July 1819, p. 489.

——— (11.)—(Crooks.) In the Neidpath entail there was no express prohibition, either against granting leases, or against taking grassums, but there was a prohibition to *alienate*. There was a permissive clause to grant leases for the granter's lifetime, or the lifetime of the receiver thereof, but "always "without evident diminution of the "rental." A lease was first granted for twenty-six years, at £12 of yearly rent, with £115 grassum paid. This was renounced in 1791, for a fifty-seven years' lease, at the same rent, but with no grassum paid. This lease, before its expiry, was also renounced for a new lease, with an alternative period of duration for 31 years, or for 29, 27, 25, 23, 21, or 19 years, for whichever the Duke might be found to have power to grant it. It was contended that this lease was just a continuation of the first lease, and affected by the grassum then taken, and also that it was granted with evident diminution of the rental, and beyond the duration allowed by the entail. Held, that as no grassum was paid, the lease was not void on that ground, and the Court sustained the lease for twenty-one years. In the House of Lords, remitted for reconsideration, with doubts expressed as to the validity of a lease having no terminable or fixed ish.—Earl of Wemyss *v.* Johnstone, &c., 12th July 1819, p. 493.

ENTAIL. (12.)—(Flemington Mill). In the Neidpath entail, a lease of part of the lands was granted in 1788 for fifty-seven years, at a rent of £90, no grassum being then paid for it. This lease was, in 1807, renounced for a new lease for 31 years, or such other term of 29, 27, 25, 23, 21, and 19 years, as it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid for this lease, that the same was good for twenty-one years. In the House of Lords the case remitted for reconsideration, as in the previous case.—Earl of Wemyss *v.* Sir James Montgomery and Others, 12th July 1819, p. 500.

——— (13.)—The case with the tenant was decided in the same manner, although he pleaded that he was a *bona fide* and onerous acquirer of the lease, and having obtained possession, his real right was protected

by the Act 1449, c. 17, securing tenants against singular successors. —Earl of Wemyss *v.* James Murray, 12th July 1819, p. 505.

ENTAIL. (14.)—(Liferent Leases—Whiteside.) (1.) In the Neidpath entail, a lease had been granted in 1788 for fifty-seven years, with a grassum paid. That lease, in 1807, was renounced for a lease for the tenant's life, at the same rent as the former. Held that this latter tack must be held as merely a substitute for the former, and subject to every objection on the ground of grassum; and that, though the new tack was in compliance with the entail as to endurance, yet as it was affected by the grassum formerly paid, and as it was granted at the same rent, plus the cess and rogue money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords. (2.) The tenant pleaded, that whatever might be the result of the question with the executors, it could not affect the tenant entering into the lease in *bona fide*, and that he was protected by the Acts 1449, c. 17, and 1685, c. 22, as the acquirer of an onerous real right; but this plea repelled. William Murray *v.* Earl of Wemyss and March, 12th July 1819, p. 507.

——— (15.)—Case of declarator with the executors of the Duke, as to Whiteside, decided as above.—Sir James Montgomery and Others, *v.* Earl of Wemyss, 12th July 1819, p. 516.

——— (16.)—(Queensberry Entail.) The Queensberry entail contained a prohibitory clause "to sell, wad-"set, or *dispone*." It also contained a permissive clause to grant leases, but not "for any longer space than "for the setter's lifetime, or for "nineteen years, and that without "diminution of the rental at the "least for the just avail for the "time." The Duke granted leases at the old rent, taking grassums instead of an increase of rent. Before these were expired, he granted new leases upon renunciations of the old, to endure for his life, *and* for nineteen years thereafter, granting at same time an obligation to renew these annually, so that the tenant might have a lease for nineteen years to run from the period of his death. Held in the Court of Session, that the Duke had full powers to grant tacks in this manner. In the House of Lords reversed.—Duke of Buccleuch and Queensberry *v.* Sir James Montgomery and Others (Executors of the late Duke of Queensberry), 12th July 1819, p. 520.

ENTAIL. (17.)—Case with one of the tenants, namely, of the farm of Halscar, under the Queensberry entail, as above set forth. The tenant (Hislop), stated that in the year 1786, he had obtained a lease for nineteen years of this farm for a rent of £30 per annum, and a grassum paid of £36. In the year 1797, this lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. In 1803 he procured a lease of the same farm for nineteen years, at the yearly rent of £30, the old lease being then unexpired; and, besides, there was granted an obligation by the late Duke to renew this last lease to the respondent annually, for the same period of nineteen years. In these circumstances he contended, that he had entered into possession in *bona fide*, and put out large sums on the faith of the lease, and that the action against him was, therefore, irrelevant, as his lease was protected by the Act 1449, c. 17. The Court of Session sustained his defences, and assoilzied him. In the House of Lords judgment reversed.—The Duke of Buccleuch and Queensberry *v.* Sir James Montgomery and Others, 12th July 1819, p. 540.

——— (18.)—(Tinwald Entail.) The entail of Tinwald restrained the

heirs of entail from granting "tacks "or rentals for any longer space "than nineteen years, and without "any diminution of the rental; or, "for the setter's lifetime, in case of "any diminution of the rental; "and that it should not be lawful "to any of the said heirs to take "grassums, but to set the said "lands and estate at such reason- "able rents as can be got therefor, "at least for the just avail at the time." The late Duke of Queensberry, a few years before his death, and while former leases were current, made the tenants on the estate renounce their leases for new leases for nineteen years, at a small increase of rent, but with no grassum paid. In an action, brought by the Marquis of Queensberry, against the late Duke's executors, held that such claim was not relevant. In the House of Lords partly affirmed; and *quoad ultra*, remitted for reconsideration. — Marquis of Queensberry *v.* Sir James Montgomery and Others, 26th May 1820, p. 551.

ENTAIL.—(19.) The entail of the dukedom of Hamilton contained a prohibition against *alienation*. It permitted leases, but not to exceed twenty-one years' duration; and these leases were not to be granted "with evident diminution of the "rental." The late Duke of Hamilton granted leases of thirty or forty of his farms, for twenty-one years, at a rent less than two-thirds of their value at the time, and less than one-third of their present value, to John Boyes, the Duke's own confidential factor, who sublet them, deriving a yearly surplus or increase of rent of £1376 per annum. This surplus, by an obligation taken from Mr Boyes, was agreed to be paid to Mrs Esten, who had lived with the late Duke, and to her daughter, the issue of this connection. Held the leases not warranted by the power contained in the entail.—Duke of Hamilton, &c. *v.* Mrs Esten or Warring, 24th July 1820, p. 644.

ENTAIL.—(20.) *Vide* Provision to Daughters, No. 1.

——— (21.) An entailed estate was sold under an Act of Parliament, which Act had been obtained upon the fraudulent allegation of debt, which did not exist, and the sale was set aside (*Vide* former Appeal, vol. i., p. 578) and a remit made, *quoad ultra*, to the Court of Session. On the case going back to the Court of Session, it was, *inter alia*, argued, that, before the Act of Parliament had been obtained, there was, in point of law and fact, no entail, as, in 1714, the maker of the entail of 1688, and the institute, had both concurred in executing a deed of revocation of that entail, and thus had put an end to it, Sir James Mackenzie, the institute, having, from that date to 1739, possessed the estate in fee-simple. (1.) Held it incompetent for the defender (respondent) to object that the estate of Royston did not remain entailed at the date of the Act of Parliament. Affirmed on appeal. (2.) In regard to the debts, Held that two of these were not true debts against the estate, but that Lady Ann's bond was a good debt.—Stewart *v.* Sir Kenneth Mackenzie, Bart, 20th Dec. 1757, p. 711.

——— (22.) John Macculloch executed an entail in favour of himself in liferent, and John Macculloch, the younger, his eldest son, and the heirs-male of his body; remainder to the heirs-female of his body; and remainder to other heirs-male. The entail was recorded, and charter and infeftment followed upon it. Some time thereafter, he, with consent of his son, revoked this entail, and sold the estate. Held that the father and son could not, by their joint act and deed of revocation, recall and rescind the entail, or sell the estate of Barholme. — Macculloch, &c. *v.* Macculloch, 18th May 1772, p. 785. —*N.B.* The next case was cited, but found not to apply.

——— (23.) Special circumstances,

in which it was held that it was competent to the maker of an entail, and the institute, to put an end to the entail, and to convey the estate, although there were prohibitory and irritant clauses against selling and conveying the estate, and the entail was recorded.—Earl of Moray *v.* Charles Ross, 6th April 1744, p. 801.

ENTAIL.—(24.) It was objected that an entail of leases was not good, because leases were not the natural subject of entail. Objection disregarded.—Maule *v.* Maule, 10th July 1819, p. 449.

——— (25.) An entail prohibited the sale of the estate, and laid the fetters on "the substitutes *before mentioned and described by name.*" Held that this was sufficient to include within the fetters the descendants of the body of such substitutes.—Dalrymple and Others *v.* Hunter and Others, 17th June 1784, p. 807.

——— (26.) In the entail of the estate of West Quarter, the question was, whether James Livingston could sell the estate under the following destination of the entail, "to "and in favour of the said Countess "and James, Earl of Findlater, her "husband, and longest liver of them "two, for the Earl, his liferent use "allenarly, and to James Livingston "and the heirs-male of his body, "whom failing, to his heirs-male "whatsoever?" James Living-"ston was, by express clause, prohibited from selling; and in a former appeal (*ante* vol. ii., p. 108) it was found he could not sell. There was a part of the estate which, from the state of the title, it was thought he could sell; and having sold it, the next heir after his death brought a reduction. Held that where the title of two parties is derived from the same author, neither party can object to the right of the common author.—Livingstone *v.* Warrock, 29th April 1773, p. 790.

——— (27.) In an entail, the destination was "to John, Lord Leslie, "and the heirs-male, *or* eldest heir-"female, lawfully to be procreated "of his body." The respondent was the eldest heir-female of the body of her grandfather, John, Lord Leslie. The appellant was her uncle, who was the heir-male of the body of Lord John Leslie, but not the heir-general. Held that, by the above destination, the eldest heir-female in lineal descent was to be preferred to the collateral heir-male of the body.—Hon. Andrew Leslie *v.* Lady Jane Elizabeth Leslie, 10th May 1774, p. 792. *Vide* Roxburghe Cause Competition.

ENTAIL.—(28.) In the question in regard to the leases with the executors of the Duke of Queensberry (*vide ut supra*, No. 16 and 17), the leases were held to be contraventions of the entail, and beyond the powers of the Duke; and on the case going back to the Court of Session, the executors moved the Court, that it was still competent for them and the tenants to purge the irritancy. The Court of Session refused purgation; and stated, that as the Duke was now dead, no contravention or forfeiture could be declared against him. Affirmed on appeal.—Sir Jas. Montgomery, Bart. and Others *v.* Duke of Buccleuch and Others. Also John Hislop *v.* Duke of Buccleuch, 29th June 1821, p. 819.

EXCAMBION.—An action was brought, thirty years after the excambion of the old glebe belonging to the minister of Lochalsh, for the lands of Ardhill, belonging to Lord Seaforth, to set aside and reduce that contract, on the ground that it was gone into without due authority from Lord Seaforth. Held that the transaction having been fairly gone into, and homologated both by the Seaforth family and the appellant, the same could not be disturbed. Affirmed on appeal, 20th Feb. 1815, p. 75.

EXECUTION of Trust. — *Vide* Trust Uses.

——— of Diligence.—*Vide* "Illegal Execution" and "Damages."

EXECUTION of Deed.—*Vide* "Deed" —"Statutory Solemnities."

EXCLUSIVE Title.—*Vide* Prescription.

EXPENSE of Suit.—An agreement had been entered into by the acceptor and payee of a bill, to prosecute for delivery of the oats for which the bill had been accepted, against the official assignees of the sellers, who claimed right to the oats. After the suit had gone on, the appellant (acceptor) settled the matter in dispute with the assignees, without the consent of the respondent. Held him liable in the cost (£272, 10s. 5d.) of suit. In the House of Lords held him liable only for the half of the costs incurred prior to the date of his letter intimating the settlement that had taken place.—Craig *v.* Howie, &c., 5th March 1817, p. 261.

EXPENSE of stamping missives of tack, which were objected to by the landlord as void, in an action of removing raised by him against the tenants, found wholly payable by the landlord.—Kerr, Cadell, and Others *v.* Duke of Atholl, 15th July 1815, p. 130.

EXPIRY of the Legal.—*Vide* Adjudication.

EXTRA Charges.—*Vide* "Building "Contract."

EVIDENCE.—*Vide* "Proof," "Witness," et "Parole."

——— of Debt.—(2.) Held the notarial copy of a foreign bond, with other proof, sufficient evidence of the debt.—Earl of Traquair, &c. *v.* Burrows, &c., 28th March 1815, p. 99.

——— (3.) Opinion of Lord Meadowbank, that a judicial admission in the summons was the highest possible kind of evidence, and effectual in law to establish a real right of property.—Earl of Aboyne *v.* Innes, 10th July 1819, p. 444.

FACILITY.—A deed of settlement having been challenged on the head of facility in the granter, and fraud and circumvention on the part of the grantee, the reasons of reduction were repelled in the Court of Session; but, in the House of Lords, the case was remitted for reconsideration, with certain declarations made.—White *v.* Ballantyne, 17th June 1817, p. 318.

FACTOR.—(1.) *Vide* "Trustees," liability for Factor appointed by them.

——— (2.) The respondent had acted as factor for the appellant, but it did not appear that he held any written factory. He had allowed the tenants on the estate to fall into arrears of their rents, and did not avail himself of the hypothec, to which the landlord looked for payment, and did not render his accounts regularly. Held that he was not liable for the whole arrears; but held him liable for interest at the rate of 3 per cent., and not at the legal rate, for such sums as he was liable for.—M'Douall *v.* Buchan, 2d July 1817, p. 330.

FACTORY.—*Vide* Damages, No. 2.

FALSEHOOD et Bribery.—*Vide* "Decree-arbitral."

FERRY, Right of.—*Vide* "Property, No. 5.

FEU Contract for Building.—*Vide* "Plan" et "Property."

——— Rights.—*Vide* Superior and Vassal, No. 2.

FEE and Liferent.—(1.) Held that a destination to the granter's daughter "in liferent, and to the heirs-"male of her body; whom failing, "to the heirs-female of her body in fee; whom failing, to *my own near-*"*est heirs* whatsoever, also in fee," &c.—gave a fee to the daughter, and that she had power to alter, and had effectually altered, the destination.—Molle *v.* Riddell, 19th June 1816, p. 168.

——— (2.) By an ante-nuptial contract in 1745, the Hon. Francis Charteris became bound, in contemplation of the marriage with Lady Catherine Gordon, "to secure to "himself and the heirs-male of the "marriage—which failing, to the "heirs of his body of any subsequent

" marriage; which failing, to his " nearest heirs and assignees what- " soever—the lands of Muirfoot, and " pertinents, and the lands of Le- " thenhopes; as also the sum of " £4000 of capital stock of the Royal " Bank of Scotland, and several " other sums of money, extending " to the sum of £11,581 sterling." These were afterwards sold by the father, who lived for fifty-eight years thereafter. In a claim made by the heir-male of the marriage, held that his right was that of an absolute fiar, and as a lawful and just creditor, he was entitled, under the contract of marriage, to the amount of the prices received for the lands of Muirfoot and Lethenhopes, and for the bank stock, valued as at the time they were sold, and not as at the date of the father's death, together with the sums of money settled by the said contract. —Earl of Wemyss and March *v.* Earl of Haddington and Others, 20th May 1818, p. 390.

FEE and Liferent.—(3.) *Vide* Marriage Contract, No. 3.

FORCE and Fear.—(1.) *Vide* Reduction of Deed on that ground, No. 6.

——— (2.) *Vide* Deed, No. 2 and 3.

FOREIGN Bond.—*Vide* Constitution of Debt et Bond.

FRAUD and Incapacity.—*Vide* Reduction of Deed No. 5.

FRAUDULENT Abstraction. — *Vide* " Damages," No 6.

GUARANTEE.—A letter of guarantee was granted, having reference to past as well as to future contractions. In an action against the cautioner, held that this was not a cautionary obligation requiring to be attested in terms of the Statutes, but a letter of guarantee *in re mercatoria*, and therefore constituted a valid obligation. Affirmed in the House of Lords. — Wright *v.* Paterson, 4th July 1814, p. 38.

——— (2.) *Vide* Cautioner, No. 2 et 3.

HERITABLE Bonds. — *Vide* Bankruptcy, No. 2.

HEIRS.—A lease bore to be to the tenant and his " *heirs*," secluding assignees and subtenants, without the consent of the landlord. The tenant made a will, assigning the lease to his *second* son, who, on the father's death, claimed possession of the farm in virtue of it. The landlord opposed this on the ground that the term " heirs " in a lease could not be held to include heirs nominate of the tenant, but was to be confined to heirs at law. The landlord afterwards having given his consent to the assignation, the question was disposed of on that ground.—Grieve *v.* Cunninghame, &c., 13th June 1814, p. 16.

——— (2.) RELIEF among.—*Vide* Relief, No. 1.

HOMOLOGATION. — An action was brought thirty years after an excambion of the old glebe belonging to the minister of Lochalsh, for the lands of Ardhill belonging to Lord Seaforth, to set aside and reduce that contract, on the ground that it was gone into without due authority from Lord Seaforth. Held that the transaction having been fairly gone into, and homologated both by the Seaforth family and the appellant, the same could not be disturbed. Affirmed in the House of Lords.—Innes *v.* Rev. Alex. Downie, &c., 20th Feb. 1815, p. 75.

——— (2.) Held that the leases in question were not warranted by the power contained in the entail, and therefore subject to reduction, unless the same were homologated.—Duke of Hamilton *v.* Mrs Esten or Warring, &c., 24th July 1820, p. 644.

HUSBAND and Wife.—*Vide* Divorce, No. 1.

——— (2.) *Vide* Marriage.

——— (3.) *Vide* " Divorce " No. 2.

——— (4.) *Vide* Separation and Aliment.

HUNTING and Fowling.—A party claimed a right of hunting and fowling in

the forest of Birse, on two grounds, 1st, That he had, in virtue of his titles, such an interest in the forest as to carry along with it the accessory right of hunting and fowling. 2d, By express grant, he alleged such right had been conferred on him over the whole forest. Held, (1.) That the express grant, which mentioned hunting and fowling, was inept, as being disconform to its warrant. (2.)That this mention of such a right, merely in the tenendas clause of the charter, but not in the dispositive clause, could not give a valid right. And (3.) That such a right could not be included within the clause *cum pertinentibus*, as it did not partake of that character, nor was it a natural incident to the right ascertained to belong to the appellant, which was that of a mere servitude. —Farquharson *v.* Earl of Aboyne, 22d April 1818, p. 380. On second point, *Vide* Teinds, No. 3.

HUNTING and Fowling.—(2.) A party claimed a right of fowling on the forest of Birse, belonging to the Earl of Aboyne, which was conveyed to him, along with his lands, as a privilege thereto belonging. He had also immemorially possessed and exercised this right, and had given permission to friends to fowl. Held, that there was a right of fowling vested in the respondent, and that he might give permission to his tenants, friends, or visitors, who were otherwise qualified, to shoot thereon.—Earl of Aboyne *v.* Innes, 10th July 1819, p. 444.

INCORPORATION, Rights of.—The incorporation of masons, wrights, and coopers of Portsburgh, had exclusive privilege of practising these trades within the bounds of Portsburgh. A mason, residing beyond the bounds, owned lands within the bounds, and proceeded to build houses thereon, though not a freeman. He had, however, a partner who was a freeman. Held, the working of these persons, in building on their own lands, was not a breach of the privileges of the incorporation, without prejudice to the question, Whether persons not freemen, in building upon their own lands, can employ masons who are not freemen. — Wrights, Masons, and Coopers of Portsburgh *v.* Lorimer, 29th June 1816, p 233.

INSANITY.—When deeds are sought to be reduced on the ground of insanity, it will not be enough to prove general insanity, or insanity at some particular time or other, but insanity must be proved at the date the deeds were executed.—Towart *v.* Sellars, 16th May 1817, p. 301.

INSURANCE.—(1). In effecting an insurance on a ship and freight, Held, in the Court of Session, that it was proved that the ship, on sailing on the voyage assured was seaworthy. Reversed in the House of Lords.—Douglas and Others *v.* Scougall and Co., 17th May 1816, p. 179.

——— (2.) In effecting an insurance on the cargo of a ship, Held, that having concealed that the ship was a prize-ship, going home for condemnation, and not a British bottom, and that she was not to go with convoy, but to make a running voyage, the insured were not entitled to recover. Affirmed in the House of Lords.—Reid and Co. *v.* Harvey, M'Millan, and Others, 24th June 1816, p. 197.

——— (3.) An insurance on the cargo of a vessel from Greenock to New York was effected ; and on the loss of the vessel, it was objected in claiming the sum in the Policy, that the vessel was lost owing to her unseaworthiness prior to her commencing the voyage; but this not having been proved, the insurers were found liable.—Campbell, &c. *v.* Hamilton, 29th June 1816, p. 219.

INTEREST.—(1.) Held, in making a claim against a solvent partner of a firm in Calcutta, who had acted as agents there for the party claiming, that he was entitled to charge 12 per cent., being the India rate of

interest, up to 13th November 1813, and to 5 per cent. thereafter.—Graham *v.* Page, Keble, and Others, 21st July 1820, p. 616.

INTEREST.—(2.) Objection to witness, on the ground of interest.—*Vide* Witness. No. 2.

——— (3.) Interest was charged against a party who had acted as factor in uplifting the rents of an estate, at the rate of 5 per cent. Held him liable only at the rate of 3 per cent.—M'Douall *v.* Buchan, 2d July 1817, p. 330.

IRRITANT and Resolutive Clauses.—*Vide* Entail.

JUDICIAL Admission.—*Vide* Proof. No. 4.

JUS Crediti.—Antenuptial contract of marriage settled on the heir-male of the marriage, an estate, besides bank stock, amounting to L.4000. These were afterwards sold and disposed of. The father lived fifty-eight years after that sale, surviving his own son. The grandson, who was the heir-male of this marriage, on his death, made a claim for the value of these lands, and the bank stock, calculated as at the deceased's death. Held him entitled to the value received for them, only at the time they were sold by his grandfather.—Earl of Wemyss and March *v.* Earl of Haddington and Others, 20th May 1818, p. 390.

——— (2.) The right of a party, as heir-female of the marriage, was, under a postnuptial contract of marriage, held to vest in her a *jus crediti*, so as to entitle her to grant a discharge to her father, whereby she renounced these rights.—Majendie, &c. *v.* Carruthers, 6th July 1820, p. 597.

JUS Tertii.—*Vide* Entail, No. 25.

JUSTICE of Peace.—An action was raised against Justices of the Peace, for neglect and failure in the performance of their duty. They pleaded the Act 24 Geo. II., c. 44, as protecting them in the execution of their office. Held that this act applied to Scotland. Reversed in the House of Lords, and held that it did not apply to Scotland.—Duke of Douglas *v.* Lockhart of Lee, &c., 27th March 1755, p. 706.

LANDLORD and Tenant.—(1.) *Vide* Lease. No. 1 et *seq.*

——— (2.) In the Court of Session it was held, where the farm-house of the tenant was burned down by accidental fire, that the landlord was liable to rebuild the house. Reversed in the House of Lords, and held him not liable.—Bayne *v.* Walker, 3d July 1815, p. 217.

LEASE.—(1.) A lease bore to be to the tenant and his *heirs*, secluding assignees and sub-tenants, unless with consent of the landlord. The tenant made a will, assigning the lease, at his death, to his *second* son, who, on his father's death, claimed possession of the farm. He was opposed successfully by the landlord.—(*Vide* Appeal, Vol. IV., p. 571.) The eldest son then claimed his right, whereupon the landlord came forward, and gave his consent to the assignation of the father to the *second* son. Held, this consent was sufficient to validate the assignation of the lease by the father.—Grieve *v.* Cunninghame, &c., 13th June 1814, p. 16.

——— (2.) An interdict was brought by the landlord against the tenant, to prohibit him from ploughing and cropping the farm, in violation of the mode of cropping laid down in the lease. The lease provided that the tenant was to keep the fourth part of the farm, yearly, either in hay or pasture, or to pay an additional rent over and above the year's rent, and the tenant concluded that this gave him an option to deviate, on paying the additional rent. Held the clause prohibitive and not alternative in its nature, and therefore that the tenant had no option to deviate on paying the additional rent. Affirmed in the House of Lords.—Craigie *v.* Sir Alexander

Muir Mackenzie, 12th May 1815, p. 117.

LEASE.—(3.) Written offers of lease were made by the tenants of the Duke of Atholl, through the suggestion of his factor, for fifteen years' leases of their farms, upon the footing of making and laying out money on improvements, and paying only a small increased rent. These were renewals of former leases. They entered into possession, made expensive improvements, and paid the landlord their rents for nine years, when they were warned to remove, although their leases had five years to run. No written acceptance had been returned to their offers, and no regular probative lease was gone into; and the landlord alleged that he had intimated to them that their offers were only accepted for nine years instead of fifteen. Held the lease good for fifteen years, and the tenants entitled to damages for being ejected from their farms.—Cadell, &c. *v.* Duke of Atholl, 15th July 1815, p. 130.

——— (4.) Heir of Entail's power of leasing.—*Vide* Entail, No. 8 to No. 19.

——— (5.) Under an entail, a lease of a farm was granted by the Duke of Queensberry for an alternative period of duration, namely, for 31 years, or for 29, 27, 25, 23, 21, or 19 years, whichever the Duke might be found to have right to grant it for. The tenant possessed under this lease, and the Court of Session sustained it as good for 21 years. In the House of Lords the case was remitted for reconsideration, with doubts expressed by Lord Eldon as to the validity of a lease having no terminable or fixed ish.—Earl of Wemyss *v.* Johnstone, &c., 12th July 1819, p. 493.

——— (6.) Although, in an entail, there be no express prohibition against granting leases or taking grassums, yet, if there is a prohibition to "*alienate*," this will prevent the heir of entail from granting leases for longer than the ordinary period of duration (19 years). If the word "*dispone*" be used instead of the word "alienate," it will have the same effect, these terms being equivalent and of the same import. A lease, stipulating that a grassum had been taken and received, was also held to be an alienation.—*Vide* Cases under "Entail," No. 8, et seq., to No. 18.

LEASE.—(7.) A tenant cannot, in entering into such leases, of the nature above described, plead the *bona fides* of his contract, or that his real right, fortified by possession, is protected by the Acts 1449, c. 17, et 1685, c. 22, which secures a tenant against singular successors.—*Ibid., ut supra.*

——— (8.) Leases under the Tinwald Entail having been granted for nineteen years, *at the same rent as formerly*, in contravention of the entail, which prohibited grassums, or the granting of leases "with diminution "of the rental," and which entail empowered the heirs of entail only to let the lands "at such reasonable "rents as can be got therefor, at "least for the just avail at the time." Held, that the succeeding heir of entail could not claim damages for this contravention of the entail, unless he could allege and prove fraud. —Marquis of Queensberry *v.* Sir James Montgomery and Others, 26th May 1820, p. 551.

——— (9.) Held, that a clause in a lease of coal, by which it was agreed that either party was to have the power of communicating the level of the said coal to any neighbouring coal works, did not cease or determine with the lease, but continued so long as the lessee continued to possess a right and interest in the neighbouring coal work.—Earl o Abercorn *v.* Wallace, 25th Jan 1764, p. 757.

——— (10.) A translation of a lease, held not to be reducible, under the Act 1696, although it appeared to bear the signature of the granter only on the last page.—Scott and

Young *v.* Cochran, 18th Jan. 1759, p. 719.

LEASE.—(11.) A clause in a lease for fifty-seven years, bound the tenant "to renounce at Lammas, before "the expiry of the first nineteen "years, or prorogue the same for "three years, in the option of the "said Lord Halkerston and the said "David Lawson." Held, in an action of removing, brought against the tenant, that this clause did not import an option to be exercised by the landlord alone. Reversed in the House of Lords.—Lord Falconer *v.* Lawson, 23d Feb. 1778, p. 799.

LEGITIMATION, per Subsequens Matrimonium.—*Vide* Marriage, No. 1, et Domicile.

LEX Mercatoria.—*Vide* "Guarantee."

LIFERENTER and Fiar.—*Vide* Relief.

LIABILITY of Carriers.—*Vide* Carriers.

LOCALITY.—*Vide* Teinds, Nos. 2, and 3.

MAGISTRATES of Burgh.—*Vide* Damages for neglect of duty, No. 7.

MALA, Fides, in opposing Service.—*Vide* Damages, No. 2.

MANDATE.—An agent or writer held a general commission to manage a parties affairs while abroad. Held that a service of the party during his absence abroad was sufficiently authorized under the general commission.—Molle, &c. *v.* Riddell, 19th June 1816, p. 169.

MARRIAGE Contract.—(1.) An antenuptial marriage-contract settled on the heir male of the marriage certain lands, besides bank stock, to the amount of £4000. These were afterwards sold by the father, (contractor of the marriage). He lived fifty-eight years after this sale, surviving his son, who predeceased, leaving a son. The grandson, who was the heir male of the marriage, made a claim for the value of these lands and bank stock, calculated as at the deceased's death. Held him entitled only to the value received for them at the time they were sold.—Earl of Wemyss *v.* Earl of Haddington and Others, 20th May 1818, p. 390.

MARRIAGE Contract.—(2.) *Vide* Provision.

——— (3.) By postnuptial contract, lands subject to the limitations of an entail, made in 1708, were settled in 1735 on the heirs male of the marriage; whom failing, on the heirs female of the marriage. The only issue of this marriage was a daughter, and on her marriage, her father entered into a transaction, by which he paid her a sum in consideration of her discharging her rights of succession under this contract, which she did accordingly. Held, in a reduction to set aside this discharge, brought by her son, that she had vested in her such a *jus crediti* as to give her the power to renounce and discharge her rights of succession; and that she had done so accordingly, so as to bar all claim on the part of her children.—Majendie, &c. *v.* Carruthers, 6th July 1820, p. 597.

——— (1.) The late Earl of Strathmore was born in England; he had a house in London, and estates in England; he had also estates in Scotland, and a mansion-house, and servants there; he was both a Scottish and British Peer. Having formed an illicit connection with Mary Millner, who lived with him in London, and begot him two children, (the respondent and a daughter), he married their mother while on deathbed, in order to legitimate his children, and entitle his son to succeed to his dignities and honours. Held, that though a marriage be good on deathbed, yet that the deceased having been domiciled in England, the Scottish law of legitimation *per subsequens matrimonium* could not apply.—Bowes *v.* Bowes, (Strathmore Peerage Cause), 29th June 1821, p. 645.

——— (2.) A declarator of marriage was raised by the appellant on the ground that she had been legally married to the respondent, at least

that by cohabitation as man and wife, and acknowledgment as such, she was entitled to that status, and his children to the status of lawful born children. Held that she had not proved a lawful marriage, and that the cohabitation, in this case, was not relevant to infer marriage. — Dalrymple *v.* Dalrymple, 22d March 1741, p. 671.

MARRIAGE.—(3.) A declarator of marriage and legitimation of children was brought by the respondent, founding upon marriage celebrated and performed in Scotland by some clergyman unknown; and founding also on cohabitation as man and wife in Scotland and in Holland. Held the pursuer entitled to a proof of the marriage, and also of the cohabitation as man and wife in Scotland, but not of the cohabitation in Holland. On advocation of this judgment of the Commissaries, the Court remitted to them to allow a proof of the marriage in Scotland, and of the cohabitation in Holland, as an incident of that marriage. On appeal to the House of Lords, appeal withdrawn as premature, and interlocutors affirmed. — Countess of Strathmore *v.* Forbes, 20th March 1751, p. 684.

——— (4.) In the competition for the Roxburghe estates and dignities, it was objected, that one of the parties, (Sir John Ker), through whom General Ker claimed, having committed adultery with another man's wife, and afterwards married the woman, that the issue of that marriage being unlawful, all issue descending from them were incapable of inheriting. Held that the Act 1600, annulling such marriages, could not be read as applicable to marriages of that kind, contracted long before the date of the Act. Opinion expressed on this Act, by Lord Eldon, that it not only enacted that such marriages shall be null and void, but declared that they must be declared so by the sentence of a Court, before they can be held null and void.—Duke of Roxburghe *v.* Ker, 22d May 1822, p. 820.

MINOR.—(1.) In the election of a minister to the parish of Cadder, where the right to present was vested in the whole heritors of the parish, the curator for a minor heritor granted his mandate to another party to vote for the minor. Held that the vote so given on the mandate of her curator alone, without the minor's signature or consent, was inept.—Stirling and Others *v.* Campbell, &c., 1st July 1816, p. 238.

——— (2.) A minor was engaged by his father in a copartnery trade at fourteen. Held (1.), That the minor, on the failure of the concern, was liable in the payment of the company debts.

——— (2.) A claim was made by one of the partners for advances to the company. Held, that the minor was not liable to pay such debt, as in a question between partner and partner.

——— (3.) The minor's father had signed and adjusted accounts, wherein this debt was made to appear as a debt to Milligan and Co., by the firm of which the minor was a partner. Held, that this did not bind the minor.—Wilson *v.* Laidlaw, 29th June 1816, p. 223.

MINUTES of Meeting as Evidence.—*Vide* Proof, No. 2.

MISREPRESENTATION.—*Vide* Sale, Nos. 1 and 4.

MULTIPLICATION of Superiors.—*Vide* Superior and Vassal No 2.

NEGOTIATION of Bill. — *Vide* Bill No. 2.

NEGLECT, Liability for.—*Vide* Factor No. 2.

——— (2.) *Vide* Bill No. 2.

NEGATIVE Prescription. — *Vide* Prescription No. 1, *et seq.*

NON-ENTRY Duties. — *Vide* Superior and Vassal, No. 5.

NON-VALENS Agere.—*Vide* Prescription.

NOVITER Repertum.—In a competition

as to the Roxburghe estates and honours, a sasine was found, which described the ancestor, through whom General Ker claimed as a *filius carnalis* or bastard, after the decision in the cause, both in the Court of Session and House of Lords. Lord Eldon doubted whether the sasine, which was always in the possession of the pursuer, could be held as a noviter repertum.—Duke of Roxburgh *v.* Ker, 22d May 1822, p. 820.

NUISANCE.—*Vide* Property et Plan.

NULLITIES in Titles.—*Vide* Prescription, No. 3.

OBJECTION to Witness.—*Vide* Witness, No. 1.

ONEROUS Causes.—Held, reversing the judgment of the Court of Session, that the bonds upon which a claim was made, did not instruct their onerous causes without some further proof thereof.—Murray and Others *v.* Honourable Francis Charteris and his Guardians, 3d April 1734, p. 667.

OPTION by Lease to deviate from stipulated Mode of Cropping.—*Vide* Lease No. 2.

PAROLE.— (1.) In a question as to the duration of tenants' leases, raised in a removing at the instance of the landlord, it was objected to, that parole evidence to the effect that the landlord had given only a limited acceptance of their offers, was incompetent to contradict writing. Proof allowed before answer.—Ker and Others *v.* Duke of Atholl, 15th July 1815, p. 130.

——— (2.) Held that a destination in a reconveyance of the *dominium utile* of an estate in 1779 must be held *presumptione juris* to have been authorized by, and the Act of, Mrs Hunter, the then possessor, and that parole evidence was incompetent to cut down that destination, or to prove the contrary.—Molle *v.* Riddell, 19th June 1816, p. 168.

——— (3.) The original bargain in regard to a sale of wheat was constituted by writing. But Clark transferred his interest in this bargain to Alexander Callender without writing. Held, (1.) That parole evidence was incompetent to prove the transfer or conveyance to Callender, of the wheat in question; and, (2.) That parole testimony was inadmissible to prove the constitution of an obligation of relief, assuming that to have been the character of the transaction entered into.—Clark, &c. *v.* Callender, &c., 16th June 1819, p. 422.

PARTNERSHIP.— (1.) A party was held entitled, at the distance of many years, after his claims in the executry had been adjusted and settled, to insist, that a certain heritable estate had belonged to the partnership of which the deceased was a partner, and it not having been included in the adjusted and settled accounts, he was found entitled to make this additional claim, and to a share of that heritable estate.—Listor *v.* Sutor, 24th Feb. 1815, p. 78.

——— (2.) A party had been formerly manager of the Glasgow "Glass Work Company." Besides his salary, he was allowed a share of the profits of the business, without being required to advance any capital. At the distance of many years after he quitted that situation, a claim was brought against him by the other partner for his share of loss in the concern. The Court of Session held him liable as a partner. Reversed in the House of Lords, and held, "That the appellant ought "not to be considered, *as between him* "*and his partners*, as a partner liable "to any share of the loss."—Geddes *v.* Wallace, 24th July 1820, p. 643.

——— (3.) In the articles of partnership of the Douglas, Heron, and Co.'s Banking Company, it was provided, that the heirs and executors of a deceasing partner should be obliged to receive and draw his share in the stock and profits

thereof, as the same should be ascertained by the last balance struck immediately preceding his death. The last balance was struck in November 1771. The appellant's brother died in October 1772; but in June 1772, the Company had become insolvent. In an action raised under the clause in the articles of copartnery, held that that clause could not apply to the circumstances of this case, in respect the Company had become bankrupt several months before Mr Blair's death. — Blair *v.* Douglas, Heron, and Co., 30th April 1777, p. 796.

PARTNERSHIP.—(4.) Held the appellant liable to contribute his proportional share of the debt owing by the Company, he being a partner of the Company.—Gray *v.* Douglas, Heron, and Co., 10th May 1779, p. 800.

PASSIVE Title.—*Vide* Entail No. 6.

PATRONAGES.—*Vide* Prescription No. 2.

PATRONAGE (1.) of the City Churches.—The rights of presentation to the parish churches of the city of Edinburgh belong to the Lord Provost, Magistrates, and Town Council, as patrons thereof; and the Presbytery of Edinburgh, by their several kirk-sessions, has no voice in the election or presentation to any vacancies in the parish churches within the city.—Walker, &c. *v.* Drummond, &c., 13th March 1764, p. 761.

——— (2.) The parish of Livingstone, of which Sir David Cunningham was patron, was large; and it occurred to some of the heritors and inhabitants that a new church, and a division of the parish, would be a desirable object. They subscribed funds to purchase lands, purchased these lands, and mortified them for the use of the minister, the deed of foundation vesting the management of these, and the election of the minister in the heritors and kirk-session of Whitburn, (the parish having been divided, and a separate erection obtained under that name), and excluding the patron of the parish. In an action at the patron's instance, held that he had no right to present the minister, or to the vacant stipends. Reversed in the House of Lords, and held him to have right to both.—Cunningham *v.* Wardrobe and Others, 20th Dec. 1762, p. 734.

PART and Pertinents.—Held that the right of hunting and fowling in a forest could not be conveyed under the clause *cum pertenentibus*, as it did not partake of that character, nor could it be considered a natural incident to the right of servitude over part of the forest ascertained to belong to Mr Farquharson.—Farquharson *v.* Earl of Aboyne, 22d April 1818, p. 380.

PENURIA Testium.—*Vide* "Witness," No. 1.

PENALTIES.—Held that a vassal, who was in non-entry, was not liable for the penalties of non-entry, that is, the full maills and duties of the lands, except from the date of citation to the declaratory action raised against him.—Spottiswoode *v.* Burnett, 22d March 1763, p. 747.

——— (2.) Found that a clause in a lease, providing that the tenant should observe a certain mode of cropping, "or pay an additional "rent," was not of the nature of a penalty, so as to give the tenant right to follow that mode on paying the additional rent, but that it was prohibitive in its nature.—Craigie *v.* Mackenzie, 12th May 1815, p. 117.

PLAN.—*Vide* Property, Nos. 1, and 2.

POSSESSION.—*Vide* Prescription, No. 7.

POSITIVE PRESCRIPTION.—*Vide* Prescription, No. 2, et seq.

POSTNUPTIAL CONTRACT.—*Vide* Settlement.

PRESCRIPTION.—(1.) An entail was made of the estate of Scarr, which, after being recorded, remained personal, without any title being made up under it. The institute, who was also the entailer's heir of line,

possessed on apparency for twenty years. The entailer having died in debt, the son of William Welsh, a substitute under the entail, attempted to carry off the estate as a fee-simple estate, by obtaining an assignation to these debts, and leading an adjudication upon them, upon which a charter of adjudication was obtained, but no infeftment was taken till 1793. He continued to possess until his death, without making up any other title, but left a disposition of his estate in favour of the appellant. In a reduction of that right, brought by the respondent, the next substitute heir of entail, held that the entail had not incurred the negative prescription, and that the possession of William Welsh and his son John, was to be ascribed to the entail, and not to their unlimited title of heirs of line.—Welsh, Maxwell, &c. *v.* Welsh, 29th July 1814, p. 65.

PRESCRIPTION.—(2.) Certain patronages were claimed by the Crown, as coming in place of the Bishop of Ross. The Crown had granted a right to these patronages to Sir William Keith of Delny, and through various singular successors, deriving right from him, they at last came into the possession of the Bishop of Ross, in 1636, and upon the suppression of Episcopacy, they again devolved on the Crown. The Barony of Delny, together with these patronages, had been acquired in 1656, from Sir Robert Innes, by the Cromarty family. The Earl of Cromarty was attainted in 1746; but afterwards, his forfeited estates and patronages were, by 24 Geo. III., c. 57, restored to his heirs. The question arose, whether these patronages belonged to the Crown, or to the Cromarty family? Held, that fourteen of them belonged to the Cromarty family by prescription, but in regard to the other five, no prescriptive right, and no possession having been established, the Crown was preferred to them. Affirmed in part, *quoad ultra* remitted.—His Majesty's Advocate *v.* Honourable Mrs Mackenzie, &c., 27th July 1814, p. 43.

PRESCRIPTION.—(3.) Objections were stated to the titles of an estate, by a party claiming: Held these objections to be barred after prescriptive possession of forty years.—Lawrie, &c. *v.* Livingstone, 24th June 1816, p. 194.

——— (4.) By a decree of the Court of Session, pronounced 1st March 1782, the entail of the Kelly and Balumbie estates, belonging to the Panmure family, executed in 1730, was declared to be cut off by prescription, but certain leases in that entail were sustained. Thereafter a transaction was gone into, supposed to assume the form of a submission and decree arbitral. A reduction having been brought of this decree-arbitral, held the decree-arbitral bad and set aside, in so far as the same affected the appellant's rights, and referred to the two estates above mentioned; but it was declared, that the interlocutor of 1st March 1782 was not to be considered conclusive against the respondent on the subject of the entail of the leases.—Maule *v.* Maule, 10th July 1819, p. 450.

——— (5.) Held that the original entail of the Dormont estate, executed in 1708, had been cut off, both by the negative and positive prescription.—Majendie, &c. *v.* Carruthers, &c., 6th July 1820, p. 597.

——— (6.) A conveyance by the Earl of Caithness of his estate, gave the Earl power to redeem within six years, and to the heir-male of his body at any time, to be irredeemable after that period. He died without redeeming within the six years, and without leaving any heir-male of his body. Held that the long prescriptive possession, for more than forty years after the expiry of that period of redemption, was a sufficient title to exclude.—Sinclair

v. Earl of Breadalbane, 22d February 1759, p. 728.

PRESCRIPTION.—(7.) The heirs of entail were also heirs of line, and on succeeding, possessed on titles as heirs of line, and not under the entail for thirty years, and on apparency for a period beyond the negative prescription. A party having succeeded under this title, but who was excluded by the entail, the heir of entail raised the present action to set his right aside. Held, that the negative prescription did not cut off the entail, there being no conflicting infeftments.—Balfour *v.* Lumsdaine, 14th March 1816, p. 150.

——— (8.) A Crown charter and sasine following thereon, held sufficient title to exclude an action of reduction, improbation, of right to lands which had belonged at one time to the appellant's predecessor.—Robertson *v.* Duke of Atholl, 10th July 1815, p. 116.

PRESCRIPTIVE Possession.—*Vide* Property, No. 4.

PRESBYTERY'S powers in ordering church to be built.—*Vide* Church, No. 1.

PROCESS.—(1.)—*Vide* Expenses of Suit.

——— (2)—*Vide* Res judicata, Nos. 1 and 2.

——— (3.) Held it no objection to sue an action of reduction of a lease, that the pursuer had not produced a service as heir, that being unnecessary.—Scott and Young *v.* Cochran, &c., 18th January 1759, p. 719.

——— (4.)—*Vide* Title to Sue.

——— (5.)—*Vide* Reduction, No. 5.

PROPERTY.—(1.) Certain feus were bought for building houses in Leith Links, conform to a uniform plan laid down by the seller. In the articles of roup there was a stipulation, that the houses built should be conform to that plan, which was specially referred to, and subscribed as relative thereto. In a suspension and interdict, held that the purchasers had not, in substance, deviated from these conditions as to the height of the building, although they had exceeded it by three inches.—Jameson *v.* Russell and Thomson, 17th June 1814, p. 29.

PROPERTY.—(2.) Held, (1.) That the respondents, proprietors of a house (New Club) in St Andrew Square, were not prevented from erecting on their back area, the buildings in question, by the original plan of the New Town of Edinburgh. (2.) That they were not restrained, by their charter, from making such erections; and, (3.) That the proprietors on each side of the respondents' property, had no right to restrain them, either on the ground of nuisance, or on the ground of holding any servitude, legal, or conventional, over them.—Gordon *v.* Marjoribanks, &c., 18th February and 2d March 1818, p. 351.

——— (in Water.)—(3.) Held that the respondent was entitled to the entire property or *solum* of a loch, in which the appellant claimed also a proprietary right opposite to his lands. Reversed in the House of Lords, and held, that each party's interest in the loch, extended *ex adverso* of his lands, from the shore to the middle of the loch, and that each might dig marle within his own division.—Cochrane *v.* Earl of Minto, 5th July 1815, p. 139.

——— (4.) A party was held entitled to cut tangle, and also to sea-ware, pasturage, and kelp, as immemorially possessed by him, though his property was at a distance from the shore, and though he could produce no written title, the tenure being udal.—Richard *v.* Stone, &c., 21st February 1816, p. 146.

——— (5). The respondent claimed a right of ferry from Dunoon to the opposite shore of the Firth of Clyde, which, he stated, he had possessed both by immemorial usage, and by express grant, for a period of 150 years, undisturbed. This right included the Kirn, and points elsewhere on the Dunoon side. The appellant had no express grant of

ferry; but as the Kirn was within his property, he chose to erect a public ferry there, contending that a proprietor of one barony cannot, by law, prevent the erection of another ferry over the same water, beyond his bounds. In an application for interdict (injunction), held, the respondent entitled to prevent the erection of such ferry. Affirmed on appeal. — Campbell's Trustees *v.* Campbell, 18th Feb. 1819, p. 417.

PROPERTY.—(6). *Vide* Hunting and Fowling, No. 2.

——— in Church.—(7).—Seceding Body.—A difference of opinion having occurred in the Associate Synod of Burgher Seceders, in reference to the principles of their church, regarding the power of the civil magistrate, and the ordination of ministers, the majority proposed an alteration in the formula, which was alleged to be a departure from the original principles. In a question as to the property of the church, Held that the pursuers (appellants) had failed to condescend on any acts done, or opinions professed by the Associate Synod, or the respondents, by which they could call on the Court to say that they had deviated from the original principles and standards, and, therefore, had no right to disturb the defenders (respondents) in possession of the church in question. Affirmed on appeal. —Craigdallie and Others *v.* Rev. J. Aikman and Others, 21st July 1820, p. 618.

——— (8). Three questions occurred in this case, 1st, Whether there was any power in the Road Trustees to shut up a road at Bell's Mills? 2d, Whether, supposing they had such power, this had been duly exercised? 3d, Whether, if this was not duly exercised, there had been any such acquiescence or homologation on the part of the appellant, as to prevent him from challenging the transaction between the Road Trustees and the respondent, in regard to the road. Held in the House of Lords (altering the judgment of the Court of Session), that the road had not been shut up by any competent authority, and that the soil was not legally vested in the respondent. *Quoad ultra* the case remitted to review the interlocutors, regard being had to these findings. —Walker *v.* Weir, 26th March 1817, p. 281.

PROOF.—(1).—*Vide* Witness, admissibility of.

——— (2). Held that the minutes of meeting at the election of a minister to the parish of Cadder (the patronage of which was vested in the whole heritors), could not be looked to as unexceptionable evidence of what took place, from alterations having been made upon them by the clerk of the meeting after the meeting was over.—Stirling and Others *v.* Campbell and Others, 1st July 1816, p. 238.

——— (3). A deposition was taken before a magistrate *ex parte*, from an aged testamentary witness, eighty-three years of age, in anticipation of an action being raised to reduce the deed; this was refused to be received in evidence by the Court of Session after his death. Towart *v.* Sellars, 16th May 1817, p. 301.

——— (4). Opinion stated by Lord Meadowbank, that a judicial admission in the Summons, was the highest possible kind of evidence, and effectual in law to establish a real right of property, namely a right of fowling.—Earl of Aboyne *v.* Innes, 10th July 1819, p. 444.

——— (5). Cohabitation as man and wife in a foreign country.—*Vide* Marriage, No. 3.

——— (6).—*Vide* Witness, No. 3.—Re-examination of.

PROPINQUITY.—*Vide* Service.

PROROGATION of Submission.—*Vide* Decree Arbitral, No. 3.

PROVISION.—(1). An entail bound the heirs of entail "to pay his *daughters* "*and heirs female*," 10,000 merks. The entailer had only one daughter, and his son, who had succeeded

under the entail, having fallen into debt, his trustee objected to pay this provision, on the ground, that it was conceived only in favour of such daughter as should succeed as "heir female." Held her entitled to the provision, and affirmed in the House of Lords.—Watson, &c. *v.* Glass, &c., 5th December 1744, p. 681.

PROVISION.—(2). By an ante-nuptial contract, provision was made for daughters, if one, of 40,000 merks; if two, of 50,000, payable at their respective ages of eighteen, or on marriage, providing that these should be, in full of all they could claim as natural portion, or bairns part of gear, which they, or either of them, as heirs, or heirs of line, or in any other way might claim. The respondent was the only daughter, and she claimed the 40,000 merks, when eighteen years of age; but it was objected to, that this clause supposed, that these daughters were only to be paid the provision if the estate came to daughters as *heirs of line*, and therefore, the clause was conditional. Held, that there was no condition either implied or express, and the daughter was entitled to her provision. Reversed in the House of Lords.—His Majesty's Advocate *v.* Drummond, 3d April 1753, p. 692.

PLURIS Petitio.—*Vide* Adjudication, No. 2.

RE-EXAMINATION of Witness.—*Vide* Witness, No. 3.

REDUCTION of Decree Arbitral.—(1.) *Vide* Decree Arbitral, No. 1.

——— of Deed.—(2.)—*Vide* Facility.

——— (3.)—*Vide* Death-bed, No. 2.

——— (4.)—*Vide* Deed, No. 3.

——— (5.) A reduction was brought of settlements on the head of fraud and incapacity. The appellant objected that the pursuer had no title to raise the action, and, therefore, that he ought not to be let into proof of the reasons of reduction. Held him entitled to a proof; and proof allowed to both parties.—Ross *v.* Ross and Others, 19th Jan. 1758, p. 715.

REDUCTION of Deed.—6.) A reduction was raised of certain deeds impetrated from the pursuer's mother and father, under the threat that the deed granted in his mother's favour by *her father*, was forged, and that he could procure them to be hanged for it, whereby she, with consent of her husband, was induced to grant a disposition of the estate left her by her father, and also to execute a renunciation of her right: Held these deeds invalid and ineffectual, and reduced accordingly.—Canison *v.* Marshall, 27th Jan. 1764, p. 759.

RELEVANCY.—(1.) *Vide* Decree Arbitral, No. 1.

RELIEF.—(1.) A testator left his sister the liferent of his heritable estate and his moveables, burdened with payment of "all his lawful debts," &c. The fee of this property, together with his moveable debts, he left to the appellants. The moveable estate left to the sister fell far short of paying the deceased's debts: Held her entitled to relief from the fiar, in so far as these debts exceeded the personal effects left her. Reversed in the House of Lords.—Waddell *v.* Waddell, 9th March 1818, p. 374.

——— (2.) *Vide* Teinds, No. 1, et Augmentations.

——— (3.) Held that a co-obligant, insisting on an assignation from the creditors holding a separate security over his co-obligant's separate estate, in order to operate relief against *that* estate for sums drawn out of his own estate, more than out of *it*, was not entitled to demand an assignation in the circumstances of this case.—Henderson (Garbett and Co., and Gascogne's Trustee) *v.* Carr, Glyn, and Hallifax, &c., 27th June 1816, p. 207.

——— (4.) Action of relief raised against one body of Road Trustees against the other, for sums advanced. —*Vide* Road Trustees, No. 1.

REMISSIO Injuriæ.—(1.) *Vide* Divorce, No. 1.

——— (2.) *Vide* Divorce, No. 2.

RES judicata.—(1.) Held that a former decree of the Court was not *res judicata*, so as to be conclusive against the parties. — Maule *v.* Maule, 10th July 1819, p. 449.

——— (2.) In the competition which arose for the Roxburghe estates and honours, Sir James Norcliffe Innes, now Duke of Roxburghe, had occasion, after his action to set aside General Ker's service was raised and in Court, to withdraw that action, and raise a new one, which he did by presenting a petition to the Court praying to be allowed to do so. The Court granted him liberty to do so, and at same-time "assoilzied the defender "and decerned," and found him entitled to expenses. In the new action it was pleaded that this interlocutor was a *res judicata*. It was answered, that the Court had gone beyond the prayer of the petition in assoilzieing the defender and awarding expenses; and as no judgment had been pronounced on the merits, it could not be viewed as a *res judicata*. The Court of Session held that there was a *res judicata* sufficient to bar the new action. In the House of Lords this was doubted by Lord Eldon, because it was not a judgment disposing of the merits of the cause.—Duke of Roxburghe *v.* Ker, 22d May 1822, p. 820.

REVOCATION of Deed.—*Vide* Deathbed, No. 1.

RISK of goods sold.—*Vide* Sale, No. 4.

RIOT.—*Vide* Damages against Magistrates, No. 7.

ROAD Trustees.—(1.) Held that mere presence at meetings of road trustees, at which certain things were authorized to be done, and contracts to be gone into in regard to the formation of a road, does not, *per se*, subject such trustees in personal liability for the expense of the execution of these contracts, where the trustees are acting *ultra vires* of the powers conferred by the Act; and that the only acts which could bind trustees in such circumstances, would be the actual signing of the deeds or contracts, by which the money was raised and the expenses agreed to be paid to the individuals by them. Affirmed in the House of Lords; the Lord Chancellor ruling that, where trustees in such cases, confine themselves strictly within the powers conferred, the acts of the majority will bind the other trustees; but where they act *ultra vires*, then the acts of the majority will not bind the minority, or the other trustees.—Higgins, &c. *v.* Livingstone, &c., 1st July 1816, p. 244.

ROAD Trustees.—(2.) Where, by a transaction with the road trustees and a private party, a road was shut up: Held, in the House of Lords (altering the judgment of the Court of Session), that the road had not been shut up by any competent authority, and that the soil was not legally vested in the respondent. *Quoad ultra* the case remitted to review the interlocutors, regard being had to these findings.—Walker *v.* Weir, 26th March 1817, p. 281.

SALE.—(1.) Circumstances in which a purchaser of tallow was held not entitled to object to the sale, on the ground of alleged misrepresentation as to the market price of the article at the time of the bargain, and his plea of compensation repelled. Affirmed in the House of Lords.—Mitchell *v.* Jamieson and Sons, 15th June 1814, p. 25.

——— (2.)—*Vide* Property, No. 1.

——— (3.) The dictionary called the "Encyclopædia Perthensis," during its publication in parts, was sold by public roup, but no person offered at the sale. Sometime thereafter, the appellants gave an offer for the entire work "as lately exposed for sale in Edinburgh," which was accepted of. Thereafter the ap-

pellants declined to grant the bills for the price, on the ground that the sellers had not conveyed the published parts, lying in the hands of the booksellers: Held, that the articles of roup must govern the sale, and that in these articles nothing was mentioned about conveying the parts consigned in the hands of the booksellers, but that it was a purchase of "all and whole, the "copies or parts, perfect, or imper- "fect, remaining unsold, *conform-* "*ably to inventory*," and the whole that was contained in the inventory, it was admitted had been delivered. Affirmed on appeal.—Doig, &c. *v.* Sangster, 24th March 1817, p. 265.

SALE.—(4.) Molasses were ordered by the defender, merchant in Perth, from the pursuer's constituents, merchants in London; which order was received on the 21st February, and the goods were sent to the Shipping Wharf on the 24th February; but no notice, and no invoice were sent until the 27th, and this invoice, when it arrived, bore that the goods were sent by the "Defiance," whereas they were sent by the "Kinloch," which sailed on the 25th February, and was captured at sea: Held the buyer (defender) not liable for the price, as the invoice led him to believe that the risk was only to commence on the 27th. Affirmed, on the ground, "that had "the buyer insured, he could not "have recovered under this repre- "sentation."—Arnot *v.* Stewart, 21st March 1817, p. 289.

——— (5.) Judicial Sale. In a question about the consignation of the price, held that the whole sum, as well as that ordered by the Court, ought to have been consigned.—Fraser *v.* Macdonell, 28th March 1817, p. 295.

——— of Horse.—(6.) An action was raised for repetition of the price of a horse, which, when purchased, was warranted expressly "free from vice and every blemish," and a "thorough broke horse for "either gig or saddle." The horse, when on a journey in harness, plunged, ran off, and broke the gig: Held, in the circumstances as proved, that the buyer was not entitled to repetition of the price. Affirmed in the House of Lords.—Geddes *v.* Pennington, 16th June 1817, p. 312.

SALE.—(7.) The appellant (defender) sold the growing wood on his lands of Alnie, to Mr Buchanan, and that right was transferred to the respondent, Brown, the pursuer in this cause. The appellant, from the correspondence that passed, understood that the wood was either cut, or in the course of being cut, and taken away. The estate on which the wood was then growing, was three years afterwards sold to the other respondent, Macdonald. It then turned out that the wood had never been cut under the contract of sale, and Macdonald claimed it as his. In an action of relief and damages, brought by Brown against the appellant and Macdonald, held the appellant liable in the value of the wood. In the House of Lords reversed, and held (1.) That the true meaning of the contract was, that the wood was to be cut down in the course of that season; (2.) That the whole dispute had arisen from Brown not having done so, and, therefore, he had no right to demand damages against the appellant; and (3.) That the purchaser of the lands (Macdonald) having had notice of the sale, he was to be considered as having purchased, subject to the burden of the contract of sale of the wood to Brown. —Duff *v.* Brown and Macdonald, 11th July 1817, p. 332.

——— (8.) Wheat was sold, and the original bargain in regard to it was constituted by writing; but Clark transferred his interest in the bargain to Alexander Callender, without any writing: Held that it was incompetent to prove by parole such conveyance; and it was doubted

whether, from the nature of the circumstances, this sale was not a wagering transaction.—Clark, &c. *v.* Callender, &c., 16th June 1819, p. 422.

SALMON Fishing.—(1.) Held that the appellants (pursuers) had only a general right to fishings in the Firth of Tay, and that they had not proved forty years' possession of salmon fishing *ex adverso* of their lands, in order to entitle them to fish salmon. Affirmed in the House of Lords. (2.) Held that they were not entitled to erect a new quay and pier on their own lands, prejudicial to the right of salmon fishing, belonging to the respondents. Cause remitted as to the pier.—Berry *v.* Stewart, &c., 14th April 1815, p. 102.

——— (2.) In mutual actions of declarator, raised as to the rights of salmon fishings of the Clyde: Held 1.) That both parties had established a right to a salmon fishing. (2.) As to the right to stake-nets, which both parties claimed; in the respondents' right nothing was stated about stake-nets; while the appellants' title bore reference to the fishings in these words, "cum pisca-"tione de lie yair de Ardoch," and he contended, that "yairs" necessarily included, and meant a stake-net fishing: Held, that neither party was entitled to erect any species of stake-net fishing within the bounds in question. Affirmed on appeal.—Cunninghame Grahame, &c. *v.* Dixon and Others, 19th June 1816, p. 163.

——— (3.) Held (1.) That the appellants (pursuers) had right to the fresh water fishings in the Findhorn, and that the boundaries of these fishings, extended from fixed points; and (2.) That the respondent (defender) had right to the five stells on the east side of the river Findhorn, and that Sir William Dunbar had right to the stells on west of the said river, and that the defender had the only right of fishing on the sand beds, and on the east side of the river, at all times of the tide, and also the west side during the ebbing of the sea, and that without any limitation as to the mode of fishing.—Sir William Dunbar and Others *v.* Brodie, 15th Feb. 1765, p. 760.

SALMON Fishing.—(4.) Held, that the appellants (pursuers) were prohibited, by the Act 1698, from using a stoup-net in their fishing of salmon in the river or Firth of Forth, that kind of net being a species of pock-net, which was prohibited by that Act.—Lord Erskine, &c. *v.* Magistrates of Stirling, and Others, 20th March 1765, p. 774.

——— (5.) The boundary which divided the appellant's (Brodie's) salt water fishings, in the river Findhorn, from the respondent's fresh water fishings, ascertained.—Brodie *v.* Grant, &c., 25th April 1769, p. 775, *supra* No. 3.

——— (6.) In a dispute about the right to the mussel-scalps in a certain part of the Findhorn, held them to belong to the respondent.—Sir Ludovick Grant *v.* Brodie, 25th April 1769, p. 779.

SEPARATION and Aliment.—The respondent raised an action of separation and aliment against her husband, on the ground of cruelty, and of having published calumnies against her honour and reputation, and thereby defamed her. It was objected, that there was no relevant statement to support the action. The Commissaries, after proof had been gone into, found facts and circumstances proved relevant to infer separation. On bill of advocation, brought by the husband, the Court of Session refused the bill. In the House of Lords, reversed; and held the evidence *not* sufficient to support the conclusions for separation and aliment.—Montgomery-Moir *v.* Montgomery-Moir, 24th April 1751, p. 687.

SERVICE. (1.)—*Vide* Entail, No. 6.

——— (2.)—*Vide* Damages, No. 2.

SERVICE, (3.)—Circumstances in which the appellant failed to establish his right to succeed and be served heir to the deceased Quintin Alexander. —Alexander *v.* Mark, &c., 7th April 1819, p. 444.

SERVITUDE.—*Vide* Hunting and Fowling, No. 1, et Charter, No. 2.

STAMP.—(1.) An agreement, which was written in the minute-book of a society, conveyed a real right to a well. This was sustained in the Court of Session without a stamp. Reversed in the House of Lords. —Brown, &c. *v.* Murdoch, and Others, 20th March 1815, p. 94.

———, Expense of.—(2.) *Vide* Expense, No. 2.

STATUTORY Solemnities.—*Vide* Guarantee.

STAKE-Nets.—*Vide* Salmon Fishing, No. 2.

STOUP-Nets.—*Vide* Salmon Fishing, No. 4.

SUPERIOR and Vassal.—(1.) The appellant, the vassal in the lands, laid claim to the coal of Madeston, although, in granting the feu, the superior had reserved the coal. Held, that neither by the Clan Act, nor the Charter from the Crown, subsequent to the date of the superior's attainder, was the coal granted to the appellant's ancestors, but that the right to the same was vested in the respondents, as disponees of the Crown.—Mitchell *v.* York Buildings Company, 21st March 1777, p. 795.

——— (2.) Feus having been granted by a common agent on the estate, with a right to grazings, in an action at the instance of the purchaser of the estate, these feu rights were reduced, in so far as they conferred privileges of grazing on particular lands; it appearing from the original bargain with the proprietor, that these grazings were only to be let on lease, and not granted in feu, and therefore *ultra vires*.—Bayne, and Others *v.* Campbell, 14th April 1815, p. 104.

——— (3.) Held, that a superior, who had, in giving his vassal a charter, included two separate feus, was not entitled afterwards to sell the two superiorities separately, so as to multiply superiors on the vassal. Reversed in the House of Lords, and held that they might still be disjoined by a sale of the superiorities to two different persons.—Duke of Argyll, &c. *v.* Lamont, 8th February 1819, p. 410.

SUPERIOR and Vassal.—(4.) Held, that the superior was not entitled to grant liferent conveyances of the superiority of the vassal's lands, so as to multiply superiors over him, and the dispositions reduced.—Duke of Montrose, &c. *v.* Sir James Colquhoun, 19th February 1782, p. 805.

——— (5.) In a declarator of the right of superiority, combined with an action of non-entry, held, that the right of superiority was in the appellant (reversing the judgment of the Court of Session); but held, that the vassal could not be liable for the penalties of non-entry, that is, the full maills and duties of the lands, except from the date of citation in the declaratory action raised against him.—Spottiswood *v.* Burnett, 22d March 1763, p. 747.

SETTLEMENT. (1.)—*Vide* Trust Settlement.

——— (2.) A party executed a general conveyance of all lands and heritages that should happen to belong to him at his death. The estate of Auchlossen belonged to him at the time he executed this settlement. He afterwards succeeded to the estates of Inverey and Tulloch, which had belonged to his elder brother, and the question was, Whether the heirs whatsoever, under the above settlement, could also claim Inverey and Tulloch. Held, that they could not. Affirmed.—Mearns, &c. *v.* Farquharson, 20th February 1759, p. 724.

——— (3.) *Vide* Provision.

TEINDS.—(1.) A question was raised,

Whether the appellant (as representing Adam Hepburn of Humbie) was liable in warrandice of the tithes of the parish of Crichton, to the respondents or their successors, against the future augmentations of stipend to the minister of the parish. The Court of Session held him bound in such warrandice, and therefore found him liable to relieve the respondents from such augmentations; but the original title of the appellant, having been long leases of the tithes, in the House of Lords this judgment was reversed; and held (1st), That the obligation of warrandice could only extend to the endurances of the leases, and prorogations of these leases, and to augmentations obtained while these leases were unexpired; and (2d) That the real right of titularity was not then vested in the Hepburns, to entitle them to convey any larger right.—Hepburn *v.* Sir John Callender, &c., 28th April 1814, p. 6.

Teinds.—(2.) Circumstances in which it was held in a process of locality, that an heritor had adduced sufficient title and right to the teinds of his lands, although in a former locality he had been localled on in consequence of these titles having gone amissing. In the House of Lords the case remitted.—Porterfield *v.* Officers of State and Others, 24th February 1815, p. 77.

——— (3.) In a process of locality of the minister's stipend of the parish of Eddleston, it was objected to the appellant's titles, that no right to teinds was conveyed by the dispositive clause of his disposition, although mentioned in another clause of the deed. Held by the Court of Session, that he had no right to the teinds of the lands. Reversed in the House of Lords.—Stewart *v.* Ker, 27th February 1815, p. 81.

Tenendas Clause.—Held, that the mention of a right of hunting and fowling in the tenendas clause of a charter, without being mentioned in the dispositive clause, could not carry the right. Affirmed on appeal.—Farquharson *v.* Earl of Aboyne, 22d April 1818, p. 380.—*Vide* Teinds, No, 3.

Testament.—*Vide* Conditional Institution.

Testamentary Witness.—*Vide* Witness, No. 2.

Title to Exclude.—*Vide* Prescription, No. 8.

Title to Pursue.—Held, that there was a sufficient title to sue in the action raised by the Duke of Roxburghe, to set aside General Ker's services to the estates and dignities of Roxburghe.—Duke of Roxburghe *v.* Ker, 22d May 1822, p. 820.

Trust Settlement.—A testator, by a trust disposition, after making several special provisions, divided the whole residue among his widow, sons, and daughters, in the proportions following:—"The division to "run thus, as nine to ten, that "is to say, for every ten pounds "that shall fall to the share of *each* "of my sons, my spouse and three "youngest daughters, shall be nine." The question arose upon this clause, Whether for every £10 that each of the sons took, the daughters were to draw £9 *each*, or only £9 among them, as a class. The Court of Session held, that while the sons took £10 *each*, the widow and daughters were only entitled to £9 among them in a class. Reversed in the House of Lords; and held them entitled to £9 each for every £10 drawn by each of the sons, according to the true construction of the trust disposition.—Brodies *v.* Brodie, 26th March 1817, p. 270.

Trustees Liability for Neglect.—(1.) Held, that trustees were conjunctly and severally liable to the creditors for neglect, in not calling the factor, appointed by them, to account for his intromissions, by which the whole trust funds were lost to the creditors. (2.) Held, that the acting or managing trustee was not entitled to claim relief against the

other trustees, for the proportional amount found due to the creditors, in consequence of his liberating the factor, when apprehended, at the instance of the trustees, on caption, without the consent of the other trustees. Affirmed on appeal.—Stewart, &c. *v.* Elder and Others, 21st June 1816, p. 186.

TRUSTEES.—(2.) Powers of Trustees on Bankrupt Estate.—*Vide* Bankruptcy.

——— (3.) Road.—*Vide* Road Trustees, and their liability for sums borrowed, No. 1.

——— (4.) Their powers to shut up Road.—*Vide* Road Trustees, No. 2.

TRUST.—*Vide* College, Nos. 1 and 2.

TRUST Uses.—The money, rents, and personal estate belonging to a trust estate, were specially directed by the testator's will to be laid out in the purchase of land in England; and though, by Act of Parliament, power was given to appropriate certain accumulations in purchasing up debts affecting the Annandale estates in Scotland, to which the beneficiary had succeeded; yet, that the trustees and executors were still entitled, on a favourable purchase of land occurring in the counties named in the will, to recall the money so lent out, and to purchase the estates.—Dowager Marchioness of Annandale, &c. *v.* Marquis of Annandale, &c., 18th February 1755, p. 697.

USAGE Immemorial.—*Vide* Property, No. 5, et Prescription, No. 4.

VITIATION *in substantialibus*.—Held, that the commission, on which the appellants founded their claim to the office of deputy-usher in the Court of Exchequer, having been vitiated by an erazure in the signature of one of the instrumentary witnesses, was void.—Walkers *v.* Gibson, 22d February 1819, p. 441.

WARRANDICE. (1.)—*Vide* Teinds, No. 1.

——— of Horse. (2.)—*Vide* Sale of Horse, No. 6.

WITNESS.—(1.) Held, that an objection, stated to the admissibility of two witnesses, on the ground of relationship (nephews) to the party adducing them, fell to be sustained. Also, an objection having been stated to the admissibility of Anthony MacMillan, as a witness, on the ground of agency, the same was repelled, in respect that there was a *penuria testium* on the matter, in which it was proposed to examine him.—Moffat, &c. *v.* Moffat, 19th June 1816, p. 181.

——— (2.) A deposition was taken before a magistrate *ex parte*, from an aged testamentary witness, eighty-three years of age, in anticipation of an action being raised to reduce a deed; this was refused to be received in evidence after his death. Held the deposition of a witness was not to be opened up, whose testimony had been objected to on the ground of interest, and acting as agent.—Towert *v.* Sellars, 16th May 1817, p. 301.

——— (3.) Held, that it was competent to examine witnesses of new, who had been examined in a process *tournelle criminelle*, in regard to the same matters; and that it was not necessary to make the cancellation of the previous testimony an absolute condition of their being examined of new, and therefore their evidence allowed to be taken, but to be sealed up, reserving all objections.—Douglas, &c. *v.* Duke of Hamilton, &c., 12th December 1764, p. 763.

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Advocate General, His Majesty's	Robert Dick	Vacant Stipends	Reversed May 9, 1753
Advocate General, His Majesty's	Thomas Fraser	Claim on Forfeited Estates	Affirmed March 14, 1757
Advocate General, His Majesty's	John Dundas	Sale of Teinds	Affirmed April 25, 1757
Advocate General, His Majesty's	Jn. Bayne and Others	Recording of Tailzie	Affirmed April 26, 1759
Alexander, James, Esq., and Others	John Paterson, &c.	Burgh Election	Affirmed Nov. 8, 1775
Anderson, George	Charles Lauder, W.S.	Accounting — Abatement	Affirmed May 3, 1742
Arbuthnot, Jas., Esq.	Sir Dav. Cunningham	Reduction of Deed—Revocation	Affirmed April 12, 1749
Arbuthnot, Viscount	Thomas Tulloch	Do. on Ground of Insanity	Affirmed Nov. 27, 1759
Arbuthnot, Hon. John	R. Smart	Bill Transaction	Affirmed Feb. 9, 1791
Argyll, Duke of	Allan M'Lean	Prescription	Affirmed Feb. 26, 1779
Blackwood, Robert	Colonel Erskine, &c.	Competition as to Lands	Dismissed March 3, 1731
Blackwood, Robert	Wm. Marshall, &c.	Damages for Non-Delivery	Affirmed May 8, 1749
Breadalbane, Earl of	James Menzies of Culdares	Damages	Reversed March 30, 1737
Bryce, Ninian	William Bryce		Affirmed March 6, 1739
Buchan, Cap. James	Thomas Buchan	Annuity	Affirmed April 22, 1729
Buchanan, Jean	Lelias Bald and Others	Succession — Competition	Affirmed April 3, 1787
Cadell, Wm., and Sons	Margaret Cadell and Others	Accounting — Partnership	Affirmed May 18, 1786
Cairncross, Hugh	William Heatly, &c.	Bastardy	Affirmed March 9, 1769
Campbell, Sir Arch.	J. M'Neill	Transaction	Affirmed Feb. 5, 1787
Chalmers, James	Alexander Brown	Reduction of Deed	Affirmed June 14, 1783
Chisholm, Alex., Esq.	Donald M'Leod	Ques. as to Precedency between Burghs	Affirmed Aug. 17, 1784
Colquhoun, Jas., &c.	William Wilson and Others	Burgh Election	Affirmed March 13, 1761
Commissioners of Supply	Earl of Panmure	Freehold Qualification	Affirmed Feb. 10, 1767
Corbet, Jas., Provost of Dumfries	John Graham	Burgh Election	Affirmed April 25, 1759
Couper, James, and Others	Sir John Ogilvy	Damages against Trustees	Affirmed June 10, 1782
Crawford, Earl of, &c.	D. Martin and Others	Transaction	Partly Affirmed and Partly Reversed Dec. 19, 1759
Crawford, Earl of, &c.	Lady Mary Campbell	Competition	Affirmed July 24, 1784
Cuming, John, and Others	James Boyle, Esq., &c.	Burgh Election	Reversed Dec. 15, 1757
Cuming, Mrs	Jas. Dowall and Son	Suspension of Charge	Affirmed April 21, 1790
Cuninghame, William, Esq.	D. Cuninghame, &c.	Reduction of Lease, &c.	Affirmed April 25, 1786
Dalrymple, Dav., Esq.	Walter Stewart, &c.	Freehold Qualification	Affirmed March 10, 1761
Dalrymple, Sir Wm.	Arch. Campbell	Costs of Suit	Affirmed April 5, 1770
Dickson, David	George Lockhart	Reduction—Fraud	Affirmed April 20, 1748

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Douglas, William	Wm. C. Craigie, &c.	Ranking and Sale	Affirmed Aug. 22, 1778
Duff, Sir James	George Skene	Freehold Qualification	Reversed March 8, 1793
Duff, Archibald	Sir L. Grant and Others	Ditto. Ditto.	Reversed March 11, 1773
Dundas, David, Esq.	Robert Ramsay	Ditto. Ditto.	Reversed March 5, 1770
Dun, George	Hugh M'Clure	Deforcing Messenger	Affirmed April 7, 1780
Duncan, George	James Jopp, &c.	Ship Duty	Remitted July 5, 1784
Elliot, Thomas	Archibald Cockburn	Payment of Bills	Affirmed March 10, 1737
Erskine, Hon. Henry	James Ferrier, Esq.	Freehold Qualification	Affirmed April 17, 1782
Fife, Countess of, and Husband	Sir John Sinclair	Service	Affirmed April 6, 1767
Fife, Earl of	Sir L. Grant, Bart.	Freehold Qualification	Reversed March 11, 1773
Fife, Earl of	Lord Banff	Salmon Fishings	Affirmed May 7, 1780
Fowlis, Rev. John	Rich. Dodeswell, Esq.	Vestry Dispute	Affirmed April 1, 1751
Fraser, Alex., &c.	William Hall	Reduction of Lease	Affirmed April 6, 1786
Gardner, Ebenezer	George Middleton	Illegal Seizure	Affirmed March 6, 1793
Geddes, Robert	Earl of Roseberry, &c.	Effect of Arrestment	Affirmed May 21, 1739
Gibson, William	Alex. Wight, W.S.	Whether bound to Accept Bankrupt's Composition	Affirmed May 24, 1797
Gillies, Henry, &c.	Allan Waugh, &c.	Burgh Election	Affirmed May 5, 1756
Gordon, Sir John	R. Macleod	Freehold Qualification	Affirmed March 21, 1766
Gordon, Sir John	Lord Elibank	Burgh Election	Remitted March 2, 1768
Grant, Lewis	John Adam	Accounting	Affirmed May 7, 1767
Grant, Major-Gen.	Captain Duff, &c.	Freehold Qualification	Affirmed April 30, 1772
Grant, Sir Ludovic, &c.	William Rose, &c.	Superior and Vassal	Affirmed April 15, 1782
Hamilton, Duchess Dowager of	Duke of Hamilton	Warrandice	Affirmed March 29, 1727
Hay, Sir Thomas, &c.	Mr Thomas Hay	Payment of Bond	Affirmed March 31, 1750
Hepburn, James	John Hepburn	Reduction of Decree Arbitral	Affirmed in ab. March 6, 1737
Hepburn, George	George Cranstoun	Board and Aliment	Affirmed Feb. 20, 1775
Heron, Patrick, &c.	Earl of Galloway, &c.	Tack of Tythes	Reversed March 5, 1736
Holburne, Francis	Robert Haldane, Esq.	Burgh Election	Affirmed Feb. 11, 1761
Home, Henry, Esq.	John Gowdies	Crown Grant	Affirmed Jan. 1, 1758
Home, Earl of	William Wilson	Prescription	Affirmed April 9, 1772
Hunter, Robert	James Buchan	Landlord and Tenant	Affirmed June 10, 1782
Innes, William	Gibson and Balfour	Bill, Payment of	Affirmed April 15, 1772
Ireland, William	Hon. Charles Stewart	Freehold Qualification	Affirmed June 6, 1797
Irvine, John	John Irvine	Reduction — Incapacity	Affirmed April 5, 1756
Irving, Jeffrey, Esq.	Sir John Douglas	Reduction	Affirmed April 26, 1770
Jackson, John, Esq.	John Monro, Esq.	Admiralty Jurisdiction	Reversed March 8, 1779
Johnstone, John, Esq.	Wm. Gordon, Esq.	Freehold Qualification	Reversed March 9, 1770
Johnstone, Archibald	Thos. and John Hony	Payment of Bill	Affirmed April 10, 1770
Law, John, Esq., &c.	L. Brebner or Goodsire	Papist Succeeding	Affirmed Feb. 7, 1757
Leslie, Rev. William	Jn. Innes and Others	Freehold Qualification	Affirmed March 24, 1794
Linlithgow Town Council	Henry Gillies, &c.	Burgh Election	Affirmed April 11, 1775
Lindsay, David	George Kinloch	Aliment	Affirmed Feb. 17, 1796
Lovat, Lord	Sir Jas. Mackenzie, &c.	Multiplepoinding	Affirmed April 13, 1727
Macdonald, Colin	Ronald Macdonald	Removing	Affirmed April 13, 1772
Macdonald, Ron. and Alexander	H. Butter	Removing	Affirmed April 4, 1770
Mackenzie, John, &c.	John Scott	Burgh Election	Affirmed March 16, 1763
Macintosh, Robert	John Baxter, &c.	Burgh Election	Affirmed Feb. 24, 1770
Macleod, Roderick	Sir John Gordon, &c.	Whether Heritable, Office attachable for Debt	Affirmed April 3, 1770
Magistrates of Edinburgh	*Vide* Patterson		
Magistrates of Kinghorn	Earl of Moray	Ferry at Kinghorn	Affirmed Feb. 26, 1768
Marshall, William	Messrs Cunninghame and Co.	Suspension of Charge	Affirmed May 5, 1780

APPELLANTS.	RESPONDENTS.	SUBJECT MATTER.	JUDGMENT AND DATE.
Martin, Thomas, and Others	Robt. Dick and Others	Burgh Election	Affirmed Feb. 17, 1766
Mercer, Charles	William Mercer and Others	Damages	Affirmed June 8, 1785
Milne, Alexander	George Skene	Freehold Qualification	Reversed Feb. 16, 1794
Monro, David, W.S.	John Davidson	Redemption	Affirmed April 9, 1739
Mure, Wm., of Caldwell	David Campbell, Esq.	Freehold Qualification	Affirmed Dec. 1, 1760
M'Culloch, David	Christian M'Culloch	Payment of Provision	Affirmed April 17, 1727
M'Crie, James, &c.	Dav. Smith and Others	Repairing Roads	Affirmed April 1, 1757
M'Dowall, John	Mrs Jean Ferguson	Accounting	Affirmed May 28, 1783
M'Dougall, Alexander	Dr S. Threipland	Landlord and Tenant	Affirmed March 12, 1789
Ogilvie, Sir John	Skene and Douglas	Election	Reversed March 4, 1768
N.B.—Seventeen other appeals disposed of in same manner			Reversed March 4, ——
Ogilvy, Mrs., or Barclay	Mrs Mary Gordon	Damages for Libel	Affirmed March 18, 1789
Patterson, Thos., and Others, Magistrates and Town Council of Edinburgh	Thos. Haddoway, &c.	Jurisdiction of Edinburgh over Leith	Affirmed May 8, 1733
Paterson, John (the Stirling weavers)	John Paterson, &c.	Regulations — Yarn Market	Remitted Feb. 28, 1780
Pitcairn, Alexander	Patrick Crichton	Usury	Affirmed Feb. 9, 1740
Ramsay, Major Geo. &c.	Magistrates of Edinburgh	Taking Water of Certain Springs	Affirmed with Var. March 31, 1789
Renton	Renton	Provision	Affirmed Jan. 26, 1746
Robb, Robert, and Others	Robert Hunter, &c.	Burgh Election	Affirmed March 27, 1767
Roseberry, Earl of	Vicount Primrose	Recording Entails	Affirmed April 3, 1767
Ross, David	Sir John Gordon, &c.	Freehold Qualification	Reversed March 9, 1770
Rothes, Earl of	Sir John Anstruther	Bill, Payment of	Affirmed Dec. 7, 1772
Scott, Aw., and Others	Magistrates of Glasgow.	Burgh Regulations	Affirmed Feb. 7, 1738
Scott, James	Lord Falconer	Salmon Fishings	Affirmed Feb. 3, 1772
Sinclair, John, Esq.	Sir Wm. Dunbar, &c.	Damages against Justices	Affirmed May 28, 1772
Sibbald, William	Andrew Dewar	Banking Transaction	Affirmed May 16, 1787
Spalding, Alex., Esq.	Margaret Lawrie, &c.	Recording Entail	Affirmed March 28, 1766
Stewart, Sir John, &c.	Patrick Crawford, &c.	Landlord and Tenant	Remitted April 10, 1738
Stewart, Lieut. James, &c.	David Dalrymple, Esq.	Freehold Qualification	Reversed April 1, 1762
Stewart, Robert	Amie Stewart	Construction of Deeds	Affirmed July 10, 1784
Stewart, Charles, Esq.	Sir Jas. Colquhoun, Bt.	Penal Actions	Affirmed Feb. 7, 1791
Stirling, John, Esq.	Robert Drummond	Transaction	Affirmed with Var. March 15, 1790
Stirling Weavers —	*Vide* Patterson		
Sutherland, Dr Hugh, &c.	Alex. Graham, &c.	Illicit Trading	Affirmed Jan. 24, 1758
Sutherland, Lieut. William	Unquhart and Others	Ranking and Sale	Affirmed April 28, 1770
Taylor, Archibald	John Blain	Right to Coal	Affirmed May 7, 1767
Thomson, William	Mal. Macmillan	Agreement	Affirmed Feb. 19, 1787
Udny, Alexander, Esq.	John Robertson, &c.	Salmon Fishing	Affirmed Feb. 12, 1776
Wemyss, Hon. James, &c.	Hon. H. Mackay	Burgh Election	Dismissed May 23, 1759
Wemyss, Countess of	Major J. Stewart	Action on Bond	Affirmed May 27, 1773
Whitefoord, Jas., Esq.	Sir Dav. Cuninghame	Reduction of Deed — Revocation	Affirmed April 12, 1749
Wight, Andrew, &c.	Richard Stewart	Mandate	Affirmed Jan. 25, 1747
Wilson, Alex., &c.	William Lane	Damages for Illegal Arrest.	Affirmed Nov. 29, 1766
Wood, George	Janet Wilson	Filiation and Aliment	Affirmed Feb. 23, 1746
Wright, Thomas	John Ure	Deathbed	Affirmed May 1, 1772
York Buildings Coy.	Duke of Norfolk	Decree of Sale	Affirmed Jan. 31, 1764
York Buildings Coy,	Wm Pulteny, Esq.	Bond of Relief	Affirmed June 19, 1782

ERRATA.

In Vol. II., case Lyall *v.* Skene, &c., p. 139, *for* "at usque," *read* "aliisque."
Same Vol., case Threipland *v.* Welsh, &c., p. 496, 8th line from bottom, *for* "assignation followed," *read* possession followed."

In Vol. III., case Hog *v.* Lashley, &c., p. 248, *for* "Robert" Hog, *read* "Roger" Hog.
Same Vol., case M'Donald *v.* Burt, p. 515, 16th line from bottom, *for* "ought to be," *read* "ought *not* to be."
Same Vol., case Straiton *v.* Graham, p. 134, 8th line from top, *for* "*so nomine*," *read* "*eo nomine*."

In Vol. V., case Rocheid *v.* Kinloch, &c., p. 37, *for* "Sir Alexander," *read* "Alexander;" and at p. 38, last paragraph, *for* "ten years," *read* "forty years;" and at same page, Baird of Newbyth's debt, *for* "only debt," *read* "only personal debt."

In Vol. VI., case Montgomery, &c., *v.* Earl of Wemyss, p. 465, *for* "James Montgomery," *read* "Sir James Montgomery."
Same Vol., case Wilson *v.* Laidlaw, note, p. 233, *for* "minoritati," *read* "minorennitati."

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